84-268

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SUPREME COURT OF THE UNITED STATES
October Term, 1984

Case No.

A-1 KING SIZE SANDWICHES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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85PC

QUESTION PRESENTED FOR REVIEW

In light of Section 8(d) of the Labor Management Relations Act and this Court's holdings that the National Labor Relations Board cannot regulate the substantive terms of a collective bargaining agreement or impose its views on what terms a party must accept, did the Eleventh Circuit improperly enforce a Board bargaining order by holding that such order and the Board's finding of bad faith "surface" bargaining can be based exclusively on the substantive content of the Petitioner-Employer's bargaining proposals and on the Petitioner's failure to agree to certain Union proposals?

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GROUNDS FOR JURISDICTION

(i) **Date of Judgment** - May 21, 1984. Clerk of Eleventh Circuit Court of Appeals has advised that there is no time entry on that Court's "docket-in" stamp.

(ii) **Statutory Provision Conferring Jurisdiction.** 28 U.S.C. §1254(1) and Rule 17.1(a) and (c) of the Rules of the Supreme Court. Conflict in reported decisions of the United States Court of Appeals and decision of a federal question by a United States Court of Appeals in a way in conflict with applicable decisions of this Court.

STATUTORY PROVISIONS INVOLVED

LMRA Sec. 8(a)(5), 29 U.S.C. §158(a)(5):

> Sec. 8(a) It shall be an unfair labor practice for an employer -
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

LMRA Sec. 8(a)(1), 29 U.S.C. §158(a)(1):

> Sec. 8(a) It shall be unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

LMRA Sec. 8(d), 29 U.S.C. §158(d):

> Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

STATEMENT OF CASE

After certification of the union, the employer, A-1 King Size Sandwiches, Inc., a Florida corporation,[1] the Petitioner herein, entered into collective bargaining negotiations with the union for an initial agreement. Unable to reach an agreement, and without taking economic action, the union filed an unfair labor practice charge with the National Labor Relations Board (hereinafter "NLRB") alleging that the employer had bargained in bad faith in violation of 29 U.S.C. §158(a)(1) and (5).

Based solely on the content of the employer's bargaining proposals and on the employer's refusal to agree to certain union proposals, the NLRB found that the employer had bargained without true intent to reach agreement and thus in bad faith. The NLRB petitioned for enforcement in the United States Court of Appeals for the Eleventh Circuit, which enforced the NLRB's Order by concluding that the employer's proposals, its insistence on those proposals and its refusal to agree to certain union proposals evidenced that the employer had no real intention of concluding an agreement.

[1]Listing of parent companies, subsidiaries and affiliates: None.

BASIS OF FEDERAL JURISDICTION IN UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e) empowers the National Labor Relations Board to petition a court of appeals of the United States for judicial enforcement of the Board's order. This case arose in Florida.

ARGUMENT

I. **THE NATIONAL LABOR RELATIONS BOARD HAS NO AUTHORITY TO PASS JUDGMENT ON WHETHER ONE PARTY HAS BY AGREEMENT GIVEN ANOTHER PARTY SUFFICIENT CONTRACTUAL RIGHTS; THE COURT OF APPEALS BELOW THEREFORE DEPARTED FROM CONTROLLING PRECEDENTS OF THIS COURT AND CREATED CONFLICT ON A FEDERAL QUESTION BETWEEN ITSELF AND THE THIRD, NINTH AND DISTRICT OF COLUMBIA CIRCUITS BY HOLDING THAT THE PETITIONER BARGAINED IN BAD FAITH ON THE SOLE GROUND THAT THE CONTRACT THE PETITIONER INSISTED ON CONTAINED PROPOSALS WHICH WERE DEEMED UNUSUALLY HARSH AND UNREASONABLE AND WHICH WOULD HAVE ASSERTEDLY LEFT THE UNION AND EMPLOYEES WITH FEWER RIGHTS AND LESS PROTECTION THAN AFFORDED BY A NATIONAL LABOR RELATIONS BOARD CERTIFICATION.**

A. **United States Supreme Court Precedent**

Over thirty years ago, in a case in which the National Labor Relations Board was directed that it is not unlawful for an employer to insist upon a contract article excluding from arbitration employer decisions on hiring, promoting, discharging, demoting, disciplining for cause and scheduling, this Court stated:

> The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. *NLRB v. American National Insurance Co.,* 343 U.S. 395 at 402, 72 S.Ct. 824 at 828, 96 L.Ed. 1027 at 1036 (1952).

After reviewing the legislative history of the 1947 Taft-Hartley Amendments to the Act, specifically the addition to §8(d) that the duty to bargain collectively does not compel either party to agree to a proposal or require the making of a concession, this Court concluded:

> Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. *Id.* at 408; 72 S.Ct. at 832; 96 L.Ed. at 1039.

This Court noted that a reason for the amended language was that the Board had incorrectly made itself the judge of "what concessions an employer must make and of the proposals and counter-proposals that he may or *may not* make." *Id.* at 404, 72 S.Ct. at 829; 96 L.Ed. at 1037 (emphasis added). The amendment made it clear that the Board cannot compel concessions "or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Id.* at 404, 72 S.Ct. at 829, 96 L.Ed. at 1037.

In *H. K. Porter Company* v. *NLRB,* 397 U.S. 99, 90 S.Ct. 821,

25 L.Ed.2d 136 (1970) this Court reviewed a court of appeals' order that required the employer to agree to a "checkoff" article whereby the employer would deduct union dues from wages and remit to the union. This court reversed, stating that the basic theme of the Act was to have employers and employees resolve their respective concerns through collective bargaining and mutual agreement:

> But it was recognized from the beginning that agreement might in some cases be impossible, and it was *never intended* that the Government would in such cases step in, *become a party* to the negotiations and *impose its own views of a desirable settlement. Id.* at 102; 90 S.Ct. at 823; 25 L.Ed. at 151 (emphasis added).

The Court held that the Board

> is without power to compel a company or a union to agree to *any* substantive contractual provision of a collective bargaining agreement. *Id.* at 102, 90 S.Ct. at 823, 25 L.Ed.2d at 150 (emphasis added).

This Court has thus delineated the Board's power in regulating conduct of collective bargaining and has made it clear that the Board cannot regulate the parties as to the deal they must make at the bargaining table. The direct effect and result of the judgment of the Court of Appeals in the instant case, however, is that the Petitioner must either alter its substantive bargaining position in the union's favor or be in contempt.

B. **Instant Case**

The question to be decided, as phrased by the Eleventh Circuit, was:

> Whether the content of the company's bargaining proposals together with the positions taken by the company are sufficient to establish that it entered into bargaining with no real intention of concluding a col-

lective bargaining agreement. *NLRB v. A-1 King Size Sandwiches, Inc.* 732 F.2d 872 at 874.

The Eleventh Circuit's opinion recited the Company's proposals and counter-proposals on articles covering Wages, Management Rights, Zipper Clause, No-Strike Clause, Discharge and Discipline, Layoff and Recall, Dues Checkoff, and Nondiscrimination. The Court stated that the Company's position of insisting on those proposals gave the Company "unilateral control over virtually all significant terms and conditions of employment, including discharge, discipline, layoff, recall, subcontracting and assignment of unit work to supervisors." *Id.* at 877. The Court complained that the Petitioner had focused its efforts on "requiring the employees to surrender statutory rights" without offering "any real incentive" in exchange. The Court held that:

> The Board correctly inferred bad faith from the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable. [citation omitted] They would have left the Union and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union's certification. *Id.*

The analysis was limited to the content of the company's proposals and its position of insisting on their inclusion in the agreement. The Court noted that:

> the Company bore no animus toward the Union. There is no evidence that the Company engaged in any conduct away from the bargaining table that might tend to show it would not conclude an agreement with the Union. *Id.* at 873.

For the Board, with Court approval, to presume what terms of an agreement are "predictably unworkable" and condemn them as being "unusually harsh and unreasonable" is for the Board to pass judgment on the substantive terms of an agree-

ment, substitute its view of the desirability of such substantive terms and to impose its own views as to a desirable or fair settlement. All of these assessments are what the Board cannot do, as this Court pronounced in *American National Insurance, supra,* and *H. K. Porter, supra.* For the Board and Court of Appeals to base their findings, ruling and bargaining order solely on the substantive nature and extent of what the Petitioner was willing to agree is to hold that the Petitioner must do more to satisfy the union. If this ruling is not set aside, the Petitioner will either have to make some proposals and concessions in some way more favorable and acceptable to the union or be in contempt. An employer has a right to, and should seek its most favorable terms in an initial agreement; subsequent negotiations invariably involve attempted erosion of those terms. Because, without dispute, there was nothing objectionable to the Board about the Petitioner's conduct other than what it would and would not agree to, the judgment below frustrates the employer's goal of negotiating its best first agreement, and forces the employer to offer the union better terms than the union received during bargaining.

C. **Conflict in Circuits**

1. *NLRB Cannot Restrict Scope of Review to Proposals Only*

Consistent with this Court's *American National Insurance, supra* and *H. K. Porter, supra,* decisions, the Third, Ninth, and District of Columbia Courts of Appeals have examined the totality of circumstances before finding bad faith bargaining by employers, and have held that the proposals of and the agreements made or not made by the parties, standing alone, are not a basis for finding bad faith bargaining.

The Third Circuit, in *Struthers Wells Corporation v. NLRB,* 721 F.2d 465 (3rd Cir. 1983), found that the Board had improperly injected itself into the bargaining process by finding bad faith bargaining because the employer, as here, insisted on language by which it would maintain exclusive control over merit increases and promotional opportunities. The Court found

that the Board was "doing exactly what it may not do." *Id.* at 470.

The Ninth Circuit has dealt with this issue more than any other Court of Appeals. In *Pittsburgh-Des Moines Corporation v. NLRB,* 663 F.2d 956 (9th Cir. 1981), the Court stated that on the question of whether or not a company genuinely desires to reach an agreement, the Board must consider the "totality of circumstances" which are indicia of mental state, *"and it does not suffice to rely solely upon the terms of contract proposals." Id.* at 956 (emphasis added).

In *Seattle-First National Bank v. NLRB,* 638 F.2d 1221 (9th Cir. 1981), the Court reviewed a Board bargaining order wherein the operative findings were limited to the contract proposals (*Id.* at 1225-1226), and stated:

> While this court has sanctioned the Board's consideration of the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract, [citation omitted] *inferences drawn from those proposals are not alone sufficient* to support a finding of a violation of the obligation to bargain in good faith. *Id.* at 1226 (emphasis added).

In *Seattle-First National Bank,* the employer, among other positions, sought to remove most disputes involving employees from any effective grievance and arbitration procedure and to reserve the right to change employee benefit plans without notice to the union. *Id.* at 1226 n.6. The case was remanded to the Board, and because there was, as in the instant case, no evidence or claim of bad faith away from the table, no violation was found. *Seattle-First National Bank,* 267 NLRB No. 142, 114 LRRM 1072, 1073 (1983).

In another case, which, unlike the instant case, involved some employer conduct away from the bargaining table sufficient to support a conclusion of bad faith, the Ninth Circuit, on the issue posed in the case at bar, stated:

> Board disapproval of proposed terms is not sufficient to support a finding of bad faith. [citations omitted]. A company's adamant insistence on strong pro-management terms also cannot alone support a finding of failure to bargain. [citation omitted]. The mere rejection by the employer of terms which were in a previous contract, even a clause as important to the union as a union security provision, is also not sufficient evidence of bad faith. [citation omitted]. *NLRB v. Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343 at 1348.

In *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978), the employer had insisted on a management rights clause much like the one in the instant case and other employer-oriented proposals. The Court stated:

> The right to union representation under the Act does not imply the right to a better deal. The proper role of the Board is to watch over the process, not guarantee the results, of collective bargaining. *Id.* at 877.

The Ninth Circuit, in denying enforcement, recognized in *Tomco* the same practical effect of a bargaining order which will result in the instant case:

> A finding of bad faith would require the Company to yield despite the Union's inability to enforce its will . . . *Id.* at 884.

It should be noted that the Eleventh Circuit in the instant case was mistaken in stating that the *Tomco* panel "recognized that the Board could properly infer bad faith from proposals alone . . ." *NLRB v. A-1 King Size Sandwiches.*, 732 F.2d 872 at 878. The remark in *Tomco* which elicited this erroneous statement is:

> A proposal, not the cause of impasse may nevertheless contain terms so hostile to the role of the other side's bargaining representative that it constitutes evidence of bad faith. *Id.* at 881.

As is above shown, Ninth Circuit cases, *Tomco* included, have held that bargaining proposals can be *part* of the Board's review of a bargaining situation, despite the Supreme Court's proscription of the Board's passing judgment on the content of proposals and thus on the quality of the bargain. Neither *Tomco* nor any other Ninth Circuit case has held that harsh proposals *alone* constitute a refusal to bargain.

The District of Columbia Circuit had before it a case very similar to the instant case, where the employer's proposals, in the Administrative Law Judge's mind, drastically curtailed the union's representational rights. The Board said:

> Since the Company included in its proposals no improvements in existing conditions of employment which might compensate the employees for this sweeping relinquishment by the Union of their right to representation, its proferred contract was one which the Union could not possibly justify to the employees and hence frustrated rather than furthered collective bargaining. *NLRB v. Florida Machine & Foundry Co.*, 441 F.2d 1005, 1009-1010 (D.C. Cir. 1970).

The Court rejected the Board's criticism of the employer's proposals and held that the Board had based its ruling on the finding that the employer had made no meaningful concessions on any major issue. *Id.* at 1009-1012. The Court, citing *Porter, supra*, held that the Board had incorrectly permitted its view on the merits of the substantive terms at issue between the parties to cloud its judgment of the employer's good faith. *Id.* at 1010.

In 1982 the District of Columbia Circuit in *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982) noted with approval the Ninth Circuit's holdings in *Seattle-First National Bank, supra*, and *Pacific Grinding Wheel, Co., supra*, stating that "an employer's adamant insistence on pro-management terms does not alone demonstrate bad faith."

2. *NLRB Scope of Review Can Be Restricted Just to Proposals*

In the instant case, the Eleventh Circuit unequivocally confined its review and holding to the Board's opinion of the restrictive and one-sided nature of the Petitioner's bargaining proposals and to the Petitioner's failure to agree to certain union proposals. *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872 at 877-878. In support of its conclusion, it relied on *NLRB v. F. Strauss and Son, Inc.*, 536 F.2d 60 (5th Cir. 1976), where an employer's insistence on a nine day agreement duration article was found to be in bad faith because the employer hoped that a decertification petition would be filed although there was no reliable evidence that the union had lost its majority status, and on *Huck Manufacturing Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982) where a three months duration article, with employer refusal to agree to an arbitration provision or a union dues checkoff, were major issues at the table.[2]

Also relied on by the Court below is *NLRB v. Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979), where the Board had found that the employer's proposals would have put the employees in a far worse position with the union than without it. On the appropriateness of limiting the scope of review to the proposals at the table, the Seventh Circuit said:

> Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. [citations omitted].
>
> We find that the combination of unrealistically harsh positions adhered to by the company for six months and the avoidance of bargaining on key economic issues provides substantial support for the ALJ's conclusion. *Id.* at 609-610.

D. **Conclusion**

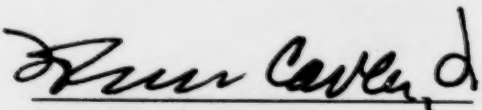
Despite the admonitions and teachings of this Court in *American National Insurance, supra,* and *H. K. Porter, supra,*

[2]In *Huck* there was independent evidence of a violation of the Act by discriminatory payments of bonuses to nonstriking employees. *Id.* at 1180.

which the Third, Ninth, and District of Columbia Circuits have accepted, the Eleventh Circuit has in the instant case restricted its inquiry of employer motivation solely to the content of the employer's proposals, the employer's position of insisting upon them and the employer's not agreeing to certain union proposals. This holding is in conflict with the above-cited decisions of this Court. This holding also identifies the instant decision of the Eleventh Circuit with the above-cited Fifth and Seventh Circuit decisions as being in direct conflict with the above-cited decisions of the Third, Ninth, and District of Columbia Circuit Courts of Appeals.

It is respectfully urged that a writ of certiorari be directed to the United States Court of Appeals for the Eleventh Circuit so the issue can be heard by this Court and the conflicts resolved.

Respectfully submitted, this
17th day of August, 1984.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the within and foregoing has been furnished by U.S. Mail from Jacksonville, Florida this 17 day of August, 1984 to all parties required to be served by and otherwise as required by Rule 28.4(a) and .5, Rules of the Supreme Court. The following parties were thus served.

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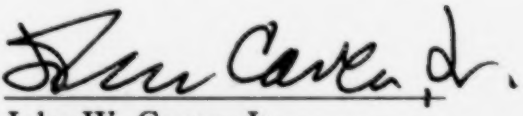

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APPENDIX

SUPREME COURT
OF THE UNITED STATES
October Term, 1984

No.

A-1 KING SIZE SANDWICHES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Appendix to
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3193

NLRB No. 12-CA-9872

NATIONAL LABOR RELATIONS BOARD

Petitioner,

vs.

A-1 KING SIZE SANDWICHES, INC.,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

---

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the National Labor Relations Board's application for enforcement of its order, and was argued by counsel;

It is now here ordered and adjudged by this Court that upon the application for enforcement of the National Labor Relations Board, the Board's order in this cause be, and the same is hereby, ENFORCED;

It is further ordered that respondent pay to petitioner, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 21, 1984
For the Court: Spencer D.
Mercer, Clerk

By: _____

ISSUED AS MANDATE: JUNE 13, 1984

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

June 13, 1984

Mr. Elliott Moore
Deputy Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, NW
Washington, D.C. 20570

No. 83-3193 NLRB v. A-1 King Size Sandwiches, Inc.
NLRB NO. 12-CA-9872

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as an for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. *See attached notice.*

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclosed a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

(X) Original record on appeal or review. 2 vols. ROA

( ) Original exhibits.

(X) Bill of Costs approved by this Court.

Sincerely,
SPENCER D. MERCER, CLERK

By: _____
Deputy Clerk

Encl.
cc: Ms. Elinor H. Stillman
Mr. John W. Caven, Jr.

RECEIVED: JUNE 15, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

A-1 KING SIZE SANDWICHES, INC.,
Respondent.

No. 83-3193

United States Court of Appeals,
Eleventh Circuit

May 21, 1984.

On application for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Dyer, Senior Circuit Judge, held that substantial evidence supported finding that company failed to bargain in good faith and, instead, engaged in surface bargaining.

Enforced.

Labor Relations 574

Substantial evidence relative to content of company's bargaining proposals together with positions taken by company supported finding that company entered into bargaining with no real intention of concluding a collective bargaining agreement, thereby supporting conclusion that company engaged in surface bargaining in violation of National Labor Relations Act. National Labor Relations Act, § 8(a)(1, 5), as amended, 29, U.S.C.A. § 158 (a)(1, 5).

Elliott Moore, Deputy Assoc. Gen. Counsel, N.L.R.B., Elinor H. Stillman, Washington, D.C., for petitioner.

John W. Caven, Jr., Jacksonville, Fla., for respondent.

Application for Enforcement of an Order of the National Labor Relations Board.

Before RONEY and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

This case is before us upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Relations Act, 29 U.S.C. §§ 151, 160(e) (1982), for enforcement of its order issued against A-1 King Size Sandwiches, Inc.

The Hotel, Motel, Restaurant Employees & Bartenders Union, Local No. 737, filed an unfair labor practice charge against the Company, alleging that the Company failed to bargain in good faith, and, instead, engaged in surface bargaining. In due course the administrative law judge issued a decision finding that the Company had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1), (5)(1982), by engaging in surface bargaining with no intention of entering into a collective bargaining agreement. The Board affirmed the administrative law judge's rulings, findings and conclusions.

The Company argues that its proposals were not so unusually harsh, vindictive or unreasonable that they were predictably unacceptable, and its bargaining was therefore in good faith. We disagree and enforce.

The Company produces sandwiches and pies on an assembly line. It sells, distributes and delivers these products to convenience stores. After a Board certification of the Union, as the exclusive bargaining representative for a unit of the Company's production and maintenance employees, shuttle truck drivers, and shipping helpers, including between fifty and sixty employees, A-1 unsuccessfully challenged certification by

refusing to bargain. The Board's bargaining order was enforced by the United States Court of Appeals, Fifth Circuit.

There were eighteen bargaining sessions at agreed times and places during an eleven-month period. The negotiations did not result in a contract. The parties reached agreement on a recognition clause; plant visitation by Union representatives; the number, rights and duties of Union stewards; the Union's use of a bulletin board; pay for jury duty; leaves of absence; and a procedure for processing grievances and conducting arbitrations with respect to matters of interpretation or application of express provisions of the contract. As to all other subjects no agreement was reached. The administrative law judge properly found that the Company met at reasonable times and places, and that the Company bore no animus toward the Union. There is no evidence that the Company engaged in any conduct away from the bargaining table that might tend to show it would not conclude an agreement with the Union.

The well-settled principles bearing upon the issues here presented are easily stated but not so easily applied. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1982) makes it an unfair labor practice for an employer to refuse to bargain collectively with the employees' representative. The Supreme Court, in establishing the parameters to be applied under the Act, has said, "the Act does not compel any agreement whatsoever between employees and employers." *NLRB v. American Nat'l Ins.*, 343 U.S. 395, 402, 72 S.Ct. 824, 828, 96 L.Ed. 1027 (1952) (citing *Labor Board v. Jones & Laughlin Steel*, 301 U.S. 1, 45, 57 S.Ct. 615, 628, 81 L.Ed. 893 (1937)). "And it is equally clear that [under section 8(d) of the Act] the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *American Nat'l Ins.*, 343 U.S. at 404, 72 S.Ct. at 829. However, "[e]nforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of

union-management differences." 343 U.S. at 402, 72 S.Ct. at 828. Moreover,

> In evaluating the parties' good faith, the Board is not precluded from examining the substantive proposals put forth. Indeed . . . if the Board is not to be blinded by empty talk and by mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employer in the course of bargaining negotiations.

NLRB v. F. Strauss & Son, Inc., 536 F.2d 60, 64 (5th Cir.1976) (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.1953), *cert. denied*, 346 U.S. 887, 74 S.Ct. 139, 98 L.Ed. 391 (1953); *see also Huck Mfg. v. NLRB*, 693 F.2d 1176, 1188 (5th Cir.1982). And "[s]ometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to," *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir.1979).

In *Chevron Oil Company, Standard Oil Company of Texas Division v. NLRB*, 442 F.2d 1067, 1074 (5th Cir.1971), the Court was careful to iterate what it had said on previous occasions, "We do not hold that under no possible circumstances can the mere content of various proposals and counter proposals of management and union be sufficient evidence of a want of good faith to justify a holding to that effect." *Id.* at 1074 (quoting *NLRB v. Cummer-Graham Co.*, 279 F.2d 757, 761 (5th Cir.1960) and *White v. NLRB*, 255 F.2d 564, 569 (5th Cir.1958)).

The question to be decided is a narrow one: Whether the content of the Company's bargaining proposals together with the positions taken by the Company are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement. We defer to the Board to make the initial determination, but we are required to review the proposals to determine whether the Board's findings are supported by substantial evidence on the record as a whole. *See*

Huck Mfg., 693 F.2d at 1187; F. Strauss & Son, Inc., Supra, 536 F.2d at 65.

WAGES

The Company's proposal on wages retained its historic method of paying each employee. Wage increases were to be determined solely on the basis of semi-annual merit wage reviews in which the Union would be given notice of each separate review and could participate in the process, but the Company would make the final decision as to any increases. Under the wage proposal the Company was barred from reducing the wages of any employee whose wages had once risen above that level. The Union proposed a specific wage schedule but the Company adhered to its original wage proposal.

The Company insisted that it remain in total control over wages. Its proposal to continue granting wage increases on the basis of semi-annual wage reviews, in which the Company would make the final decision, coupled with the Company's Management Rights clause, *infra,* under which it had the exclusive right to evaluate, reward, promote and demote employees, left the Union's "participation" in the process meaningless. The Union was foreclosed from introducing factors other than merit into the equation. It had no contractual remedies since the granting or withholding of merit increases would not be arbitrable. The Union could not strike and, in fact, it had no leverage to require its views to be taken into account. Moreover, once an employee's wage rate increased above the level of the rate existing at the time of the contract, the Company could unilaterally reduce that which had been given in a previous merit increase and the Union could not grieve such action. It could not strike, and under the Zipper Clause, *infra,* it could not even discuss the matter with the Company. Thus the Company's unalterable position was that it remain in total control of this mandatory subject of bargaining.

MANAGEMENT RIGHTS

The Company submitted a management rights clause which initially provided that the Company retained exclusively all of its normal inherent rights and exempted the Company's decisions concerning these rights from the grievance procedure. Later the Company proposed a new management rights clause, which was much broader than the first proposal, and which reserved exclusively to the Company all authority customarily exercised by Management and "each and every right, power and privilege that it had ever enjoyed, whether exercised or not, except insofar as [the Company] has, by express and specific terms of the agreement, agreed to limitations." It further provided that the Company was authorized to:

1. Determine the qualifications and select its employees.
2. Determine the size and composition of its work forces.
3. Determine work schedules and all methods of production.
4. Assign overtime work.
5. Determine the number and types of equipment.
6. Hire, retire, promote, demote, evaluate, transfer, suspend, assign, direct, lay off and recall employees.
7. Reward, reprimand, discharge or otherwise discipline employees.
8. Determine job content and minimum training qualifications for job classifications and the amounts and types of work to be performed by employees.
9. Establish and change working rules and regulations.
10. Establish new jobs and abolish or change existing jobs.
11. Increase or decrease the number of jobs or employees.
12. Determine whether and to what extent the work required in its operations should be performed by employees.
13. Have supervisors or other non-union employees perform work of the kind performed by employees of the Union.
14. Determine assignments of work.
15. Discontinue, transfer or assign all or any part of its functions, services or production or other operations.

16. Subcontract any part of the Company's work.

17. Expand, reduce, alter, combine, transfer, assign, cease or create any job, job classification, department or operation for business purposes.

18. Alter or vary practices.

19. Otherwise generally manage the business, direct the work force and establish terms and conditions of employment.

The new proposal further expanded the original by providing that the Company could exercise all of its reserved rights without advising the Union of any such proposed action, change or modification, and exempted the Company from any requirement to negotiate over the decision, or its effects on employees except as altered by the Agreement. The substituted proposal no longer contained a clause expressly excluding the Company's decisions from the grievance and arbitration procedure.

This proposal gave the Company the absolute right to subcontract work, assign it to supervisors, abolish jobs, and transfer, discontinue or assign any or all of its operations. It also required the Union to relinquish the employees' statutory right to notice and bargaining over such actions and their effects. Finally, the grievance and arbitration procedure was largely illusory because actions taken under this clause were subject to that procedure only if the right was limited by express contractual provision, and there was no such limitation.

ZIPPER CLAUSE

The Company proposed a "zipper" clause under which "the parties [waived the] right to bargain during the life of the agreement regarding any subject or any matter referred to or covered in the agreement or any other subject matter which could be considered mandatory or permissive subject of bargaining under existing law." The Union offered to agree to the clause if the latter portion waiving the right to bargain over

any other mandatory or permissive bargaining subject was deleted. The Company refused.

NO STRIKE CLAUSE

The Company proposed a no strike clause that prohibited both the Union and employees from calling, encouraging, ratifying, participating in or engaging in any primary or sympathy strike, slow down, boycott, picketing or any other work interruption for any reason, including but not limited to alleged or actual unfair labor practices, alleged or actual unfair employment practices under any anti-discrimination law, alleged or actual breaches of contract, and showing support or sympathy for other employees or Union or their activities. The Union, although conceding that any contract would contain a no-strike clause, objected to waiving employees' right to strike over unfair labor practices or unfair employment practices. The Company declined to change the proposal. This extremely broad "no strike" clause clearly prohibited any strike for any reason.

DISCHARGE AND DISCIPLINE

The Union proposed that the Company have the right to discipline an employee for any just or sufficient cause. The Company, citing meritless discrimination charges filed against it, refused the proposal because it would subject all of the discipline and discharge actions to grievance-arbitration. This is a common non-controversial clause. When considered with the rights expressly reserved in the management rights Clause, to suspend, reprimand, discharge, or otherwise discipline employees, the Company retained unfettered control over discharges and discipline.

LAYOFF AND RECALL

With respect to layoff and recall, the Company proposed that the layoff of employees would be at the Company's sole discre-

tion. Company-wide seniority would be considered but not controlling. Selection for layoff would not be the subject of grievance or arbitration. Recall from layoff was to be at the discretion of the Company and it was not required to consider seniority. The Company insisted on the clause as presented because it wanted to make the decisions on the basis of productivity and not seniority and not make the ability question subject to grievance and arbitration.

This clause gave the Company absolute control over the selection of employees for layoff and recall and freed it from its statutory obligation to bargain over these subjects.

DUES CHECK-OFF

The Union proposed a dues check-off clause which the Company rejected as being nothing more than a Union security device and because it made employees' earnings appear lower.

The Union proposed a non-discrimination clause. The Company rejected this proposal saying that it merely restated existing law. Further, the Company considered the Union trigger-happy about filing complaints and did not want such complaints to be arbitrable.

The Union finally proposed a "swap off." The Union would agree to some type of management rights, no strike and zipper clauses if the Company would agree to a just cause for discipline and discharge provision, and seniority for layoff and recall provision. The Company refused.

Deciding when a party has reached the "point when hard bargaining ends and obstructionist intransigence begins," *NLRB v. Big Three Industries,* 497 F.2d 43, 47 (5th Cir.1974), is "an inescapably elusive inquiry." *Id.* at 46. But it is clear from our extended recital of the proposals made over a ten-month period that the Company insisted on unilateral control over virtually all significant terms and conditions of employment, including discharge, discipline, layoff, recall, subcontracting and assignment of unit work to supervisors.

Its efforts were focused on requiring the employees to sur-

soever concerning employee work and safety rules, time studies, production quotas, overtime assignments, transfers, retirement, demotions and employee qualifications - all mandatory subjects of bargaining. Elimination of unit work, discipline or discharge of employees, layoff and recall were all exempted from the grievance and arbitration procedure.

The Company's rejection of the Union's dues check-off provision was not based on any legitimate business reason and does not satisfy the statutory obligation to bargain in good faith. *See NLRB v. J.P. Stevens & Co., Gulistan Div.*, 538 F.2d 1152, 1165 (5th Cir.1976). Furthermore, we are unimpressed with the Company's rejection of a non-discriminatory clause because the Union "was trigger-happy" about filing complaints. The clause did no more than require the Company to abide by federal law to avoid discrimination against its employess on account of race, sex, age, national origin or union affiliation.

Finally, it is worthy of note that the Company responded to the Union's objections to the breadth of its original management rights and zipper clauses by submitting new proposals that were even broader. Such bargaining is clearly an indicia that the Company had little desire to work towards agreement of a contract.

The Board correctly inferred bad faith from the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable. *See NLRB v. Wright Motors*, 603 F.2d at 610. They would have left the Union and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union's certification. *See NLRB v. Johnson Mfg. Co. of Lubbock*, 458 F.2d 453 (5th Cir.1972). The Board in *Johnson* found that:

> the Company insisted on retaining unilateral control of matters which are traditionally bargainable subjects; that is, wages, hours, suspensions, disciplinary actions, discharges, and other conditions of employment, while at the same time insisting that the Union

> forfeit its primary defense to employer abuse of control. Moreover, the Respondents' insistence that the Union give up its right to bargain about, or to arbitrate, labor disputes in return for an agreement which merely incorporated existing company practices, and merely providing the Union with the right to strike in protest of alleged violations of the contract during its term, was an unfair demand of the Union... The Company was unwilling to offer any provisions which would give its employees or the Union anything more than they would have with no contract at all. As pointed out, the Company insisted as a price for any contract, that its employees give up their statutory rights to be properly represented by a union and contemporaneously insisted that the Union's hands be tied in the effective processing and settling of employee grievances . . ."

NLRB v. Johnson, 458 F.2d at 455.

The *Johnson* court enforced the Board's order "because these findings clearly demonstrated surface bargaining used as a cloak to conceal the employer's bad faith." *Id.* at 455 (citations omitted). Here we are faced with proposals that go further than those in *Johnson,* i.e., the management rights and zipper clauses are broader, and the Company's demand for a no-strike clause without any concessions was not present in *Johnson.*

We are unpersuaded that *NLRB v. Tomco Communications,* 567 F.2d 871 (9th Cir. 1978) and *Pease v. NLRB,* 666 F.2d 1044 (6th Cir.1981), relied on by the Company, are in conflict with our holding in this case. In both cases, the court recognized that the Board could properly infer bad faith from proposals alone, and in *Pease* the court expressly found that the proposals before them were not as aggravated as those in *Johnson.*

Similarly, the Company's reliance on *Gulf States Manufacturers v. NLRB,* 579 F.2d 1298 (5th Cir.1978), is misplaced. In that case the employees retained their rights to strike if arbitra-

tion was rejected on any particular issue; the employer proposed four wage schedules and a dues check-off clause; and, finally, the employer produced completed collective bargaining agreements containing provisions comparable to those it proposed.

Finally, *NLRB v. Crockett-Bradley*, 598 F.2d 971 (5th Cir.1979) and *Chevron Oil Co., Standard Oil Co. of Texas Division v. NLRB*, 442 F.2d 1067 (5th Cir.1971) relied on by the Company are readily distinguishable. In *Crockett-Bradley* the employees were not barred from striking or grieving employer actions concerning significant terms and conditions of employment, and in *Chevron* the employer did not demand unilateral control over every significant term and condition of employment.

ENFORCED.

265 NLRB No. 127

FJZ
D--9491
Orlando, FL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO.: 12-CA-9872

A-1 KING SIZE SANDWICHES, INC

and

HOTEL, MOTEL, RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 737

DECISION AND ORDER

On August 18, 1982, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to

affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, A-1 King Size Sandwiches, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C., December 13, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, as the exclusive bargaining representative of our employees in the unit described below:

> All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above Union as the exclusive representative of our employees in the appropriate bargaining unit as stated above, and embody any understanding reached in a signed agreement.

A-1 KING SIZE SANDWICHES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Robert L. Timberlake Jr. Federal Building, 500 Zack Street, P.O. Box 3322, Room 706, Tampa, Florida 33602, Telephone 813-228-2662.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE NO. 12-CA-9872

A-1 KING SIZE SANDWICHES, INCORPORATED

and

HOTEL, MOTEL, RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 737

Priscilla Morgan Fenton, Esq.
of Tampa FL, for the General Counsel

Steven L. Sommers, Esq.
(Pilacek, Cohen and Sommers),
of Orlando FL for the Charging Party

John W, Caven, Jr., Esq.
(Caven & Clark, P.A.),
of Jacksonville, FL, for the Respondent

DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Orlando, Florida on March 31 and April 1, 1982, based upon an unfair labor practice charge filed by Hotel, Motel, Restaurant Employees & Bartenders Union,

Local 737, herein called the Union, on October 13, 1981,[1] and a complaint and notice of hearing issued by the Regional Director of Region 12 of the National Labor Relations Board, herein called the Board, on November 24. The complaint, as amended at hearing, alleges that A-1 King Size Sandwiches, Inc., herein called Respondent or A-1, violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining "with the intent to frustrate the bargaining process and require the Union to abdicate its representational rights and duties . . ." Respondent's timely filed answer denies the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. General Counsel and Respondent have filed briefs which have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business and the Union's Labor Organization Status - Preliminary Conclusions of Law

Respondent is a corporation engaged at Orlando, Florida, in the business of manufacturing, distributing, and selling prepared foods such as sandwiches and pies. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

---

[1]All dates hereinafter are 1981 unless otherwise specified.

II. The Unfair Labor Practices

A. Background - The Factual Setting

At a Board-supervised representation election conducted among Respondent's production and maintenance employees[2] on April 26, 1979, a majority voted in favor of union representation.[3] Following disposition of Respondent's objections to the election, the Union was certified as the exclusive representative of the employees in the appropriate unit. Respondent challenged that certification by refusing to bargain. A charge was filed (Case No. 12-CA-8770), a complaint issued on August 31, 1979, and, on January 3, 1980, the Board granted the General Counsel's motion for Summary Judgment (247 NLRB 69). The Board's order was enforced by the United States Court of Appeals for the Fifth Circuit on December 5, 1980.[4] This is Respondent's first experience in dealing with a collective-bargaining representative.

On December 16, Respondent advised the Union that it would commence bargaining upon the Union's proper request.[5] Respondent and the Union met for preliminary conversations on December 23, 1980 and, by mutual agreement, negotiations began on January 12. Harvey Totzke, the Union's business representative (and now its secretary-treasurer) was its principal spokesman. On two occasions the Union was represented in negotiations by an attorney. Employees also attended the bargaining meetings. Charles Robinson Fawsett, Respondent's attorney, an experienced specialist in labor law and its advisor for labor relations matters, was Respondent's

---

[2]The appropriate collective bargaining unit was and is:

> All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

[3]The tally was 32 for, and 19 against, the petitioner; there was one challenged ballot. Respondent presently employs between 50 and 60 unit employees.

[4]Judgment corrected by Order dated January 31, 1981. The Court's orders are unpublished.

[5]That letter further set forth Respondent's intentions with regard to wage increases, discussed *infra*.

chief negotiator, and Roy B. Eby, Respondent's executive-vice-president, attended the sessions. There were 18 bargaining meetings between January 12 and November 3; the parties did not meet thereafter prior to the hearing herein.

The collective bargaining meetings lasted approximately two hours each. (There is no contention that Respondent failed to meet at reasonable times and places. Neither are there any contentions that Respondent bore animus toward the Union[6] or that Respondent engaged in any conduct away from the bargaining table such as might evidence the intention not to conclude an agreement with the Union. General Counsel's case is premised almost entirely upon the proposals Respondent made or failed to make in the negotiations.)

In their preliminary meeting, Totzke and Fawsett agreed that whenever they reached agreement on a bargaining proposal each would initial it. Their testimony and the records in evidence establish that agreement was reached on the following: a recognition clause, plant visitation by union representatives, rights and duties of union stewards, qualifications and benefits for employees on jury duty, the Union's use of a bulletin board, procedures for the processing of grievances and arbitrations, and leaves of absences.

In light of the nature of General Counsel's allegations and the manner in which the case was presented and briefed, discussion of the bargaining will proceed herein on an issue by issue, rather than on a chronological, basis.

B. **The Bargaining**

1. Management Rights

A proposal dealing with management rights was initially presented by Respondent in the third bargaining session, January 22. Pursuant to that proposal, management would have

[6]Respondent's exercise of its legal prerogative to test certification does not evidence such animus. See *Wright Motors, Inc.*, 237 NLRB 570 (1978), enf. 603 F2d 604 (C.A. 7, 1979).

been entitled to make unilateral decisions, not subject to the grievance procedure, in such areas as the scheduling of work time and hours, the subcontracting of work, the assignment of work to employees outside the unit, the transfer of work to or from other facilities, the determination as to the "number, types and grades of positions of employees assigned to a unit, department or project," the establishment and change of work schedules and assignments, the selection, hiring, transferring, promotion, demotion, layoff, termination, suspension, discharge or other discipline of employees, the use of supervisors or other non-unit employees to perform unit work, the alteration, discontinuance or variance of past practices, and the institution of technological changes. The Union's objections went generally to the length of management's proposal and to what it deemed to be objectionable language affecting job security. In particular, objections were raised to the language dealing with subcontracting, the transfer of work, and the performance of bargaining unit work by supervisors. Fawsett defended Respondent's position, contending that these were rights the company believed it needed to have.

In the February 5 meeting, the Union presented a counterproposal on work by supervisors. It provided that supervisors would not perform work normally performed by unit employees except in emergencies, to give instruction and training, on an experimental basis, to test materials and production, for the start up or closedown of operations, or to protect company property and insure employee safety. Respondent rejected this proposal on February 18; Fawsett explained that in Respondent's plant, supervisors worked along with the employees doing production and maintenance work with the additional responsibilities of insuring continued machine operation, preventing production slowdowns, and prohibiting horseplay. He explained that Respondent did not "feel that it could afford to pay a supervisor to stand around and watch somebody put mayonnaise on bread and cheese on the mayonnaise and a slice of ham on the cheese, etc. It would have been an expense to the

company that it could not afford."

On February 27, the Union proposed the following abbreviated management rights clause:

> The Employer may continue, and from time to time, change such rules and regulations as it may deem necessary and proper for the conduct of its business, provided, however, that the same are not inconsistent with any of the provisions of this Agreement. All such rules and regulations shall be observed by the employees.

This proposal was rejected out of hand, with Fawsett stating that it was worthless to management and would do the employer no good.

On March 6, the Union proposed new language on subcontracting and management's rights. Its subcontracting proposals would have precluded the employer from subcontracting in order to evade the obligations of its collective bargaining agreement but would have permitted subcontracting in order to maintain manufacturer's warranties, where the subcontracting would not result in terminations or layoffs of qualified employees, where the employees lacked the skills or the company did not possess the equipment to perform the work, or where completion of work with company personnel and equipment was "impractical or uneconomical." The Union's management rights proposal expanded upon its earlier rejected proposal. It provided for the exclusive retention of all management's "normal and inherent rights with respect to the management of the business," and included within those rights the selection and direction of employees assigned to any classification of work, the subcontracting of work, the establishment and change of work schedules and assignments, the layoff, termination or other release of employees from duty "for lack of work or other just cause," the establishment and enforcement of "rules for personal grooming and the maintenance of discipline," decisions with regard to the discontinuance of

operation in whole or in part, the institution of technological changes and "such measures as management may determine to be necessary to the orderly, efficient, and economical operation of the business, all except as expressly and clearly limited by the terms of this agreement . . ." Fawsett told the Union that its proposal was still not broad enough and left many important areas in doubt. At some point he explained that the company was considering, or might wish to consider, the subcontracting of maintenance work and certain aspects of shipping.

On July 12, Fawsett drew Totzke's attention to the language in Respondent's original management rights proposal which excluded all decisions in the areas covered by the management rights clause from the grievance procedure. Totzke then objected to that provision, which had, apparently, missed his earlier obeservation.

On July 20, Respondent presented a new management rights proposal (attached hereto as Appendix A). That proposal, while eliminating the language excluding the exercise of all management rights from the grievance procedure, expanded Respondent's earlier proposal. It retained to the company "each and every right, power and privilege that it had ever enjoyed, whether exercised or not, except insofar as it has, by express and specific terms of the agreement, agreed to limitations." Included within the reserved rights were the rights to: determine work schedules; assign overtime work; hire; retire; promote; demote; evaluate; suspend; transfer; assign; direct; layoff; recall; reward; reprimand, discharge or otherwise discipline employees; establish and change work rules and regulations; determine the extent to which its work would be performed by unit employees, supervisors or other non-unit employees, to discontinue, transfer, or assign any or all of its functions; open new facilities and transfer any part of its work thereto; subcontract any part of its work; make and implement time studies; institute, modify or terminate any bonus or work incentive plan (see Wages *infra*); alter or vary past practices; "and make rules and regulations for efficiency, safe practices and discipline." In

all of the above, the Union would have been required to agree "that the Company may exercise all of the above without advising the Union of any such proposed action, change or modification." Neither would the company have been required to negotiate with the Union over the decisions or their effect on employees. Totzke objected to this proposal and, on September 14, the Union's counsel, Pilacek, accused Respondent of presenting "patently unpalatable" language in order to avoid the reaching of an agreement. Pilacek unsuccessfully proposed that the parties consider swapping off some of the management rights and no-strike language. Fawsett denied that he was seeking, by Respondent's proposals, to avoid reaching a collective bargaining agreement and rejected Pilacek's request.

Respondent's position in regard to its management rights proposal remained unchanged in the September 30 letter from Eby to Totzke, summarizing its positions as of that time. That letter stated, in conclusion, that Respondent had no further proposals but would be willing to meet and consider any further proposals or ideas presented by the Union.

2. The Exclusiveness Clause

The Union's initial proposal contained language providing that the contract was "the full and complete agreement . . . on all bargainable issues and neither party shall be required, during the term of this Agreement, to negotiate or bargain upon any issue, whether it is covered or is not covered by this agreement . . ." with the exception of negotiations for the settlement of grievances and with regard to rates for newly established job classifications. There was, apparently, no discussion of this proposal.

Respondent's initial management rights proposal, presented about January 22, contained the following language:

> The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and

> proposals with respect to any subject or matter not removed by law from collective bargaining and that the understandings and agreements arrived at by the parties after exercise of such right and opportunity are set forth in the agreement. Therefore, the Company and Union each, for the life of this agreement, voluntarily and unqualifiedly waive the right to bargain, and agree that the other shall not be obliged to bargain collectively with respect to any subject or matter referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement.

Totzke objected to this language, suggesting that it was possibly illegally broad. Fawsett advised him to confer with the Union's counsel.

On April 17, Respondent presented a new proposal, specifically entitled "Exclusiveness Clause." That new clause was essentially identical to the above-quoted language except for the concluding portion of its final sentence. The April 17 proposal omitted the language concerning subjects or matters outside the knowledge or contemplation of either party. It substituted the following description as to which bargaining was to be waived:

> any subject or matter referred to or covered in this agreement or any other subject or matter which otherwise could be interpreted under existing law as a mandatory or permissive subject of bargaining.

Totzke rejected this proposal, again expressing concern that agreement would waive union rights to represent unit employees. On April 24, he offered to agree to the company's proposal if the phrase "existing law as a mandatory or permissive subject of bargaining" was deleted. On several occasions, Fawsett explained that, "once a contract was

obtained, the company wanted to preclude bargaining during the term of the agreement except as to matters which any company with a certified union . . . would be required to give prior notice . . . and to bargain about." He said that this language was his attempt to preclude "any and all contract reopeners on subjects either which the parties had agreed on or which the parties could have negotiated and agreed on." He denied that there was any attempt to preclude the company's obligation to notify the Union and discuss matters that might come up concerning working conditions or employee rights. He disputed the Union's contentions that the provisions were illegal and referred Totzke to the Union's own attorney.

Pilacek objected to Respondent's exclusiveness clause at the meeting of September 14, referring to it as "a straight-jacket." Respondent's letter of September 30 reiterated its belief that the exclusivity or zipper clause was proper and lawful.

3. No-Strike Clause

On January 22, the third bargaining session, Respondent proposed a no-strike clause. Pursuant to that clause, the Union and the employees would be precluded from engaging in any strike, either primary or sympathy, slowdown, boycott, picketing, or other work interruptions, for any reasons, including but not limited to, alleged or actual unfair labor practices, alleged or actual unfair employment practices under any anti-discrimination law, alleged or actual breaches of the contract, or sympathy for or support of any other employee or any other union or their activities. Violations of the agreement would subject an employee to immediate discharge "without recourse to the grievance procedure."

There was no substantial discussion concerning the proposed no-strike clause; the Union, however, objected to restrictions on its right to strike over unfair labor practices or equal employment opportunity law violations. Respondent expressed the position that if they were going to have a contract, the Union should agree not to strike for any purpose. In particular,

Fawsett stated, alleged violations of law could be handled through the appropriate agencies. Fawsett pointed out that the Union had filed unfair labor practice charges on behalf of three employees during 1979 and 1980, which charges were subsequently withdrawn, and approximately five charges of racial discrimination had been filed by employees with either the Orlando, Florida Human Relations Department or the Federal Equal Employment Opportunity Commission.[7] All of those charges resulted in determinations of "no merit." Fawsett described the necessity for the uninterrupted work Respondent wanted in exchange for a contract. The company's product, he said, was prepared daily pursuant to customer orders and had a limited shelf-life. The position of the parties remained unchanged throughout the negotiations. The Union acknowledged that, ultimately, any contract reached would include a no-strike clause, and maintained its objection to a clause which would preclude strikes over violations of law. Pilacek proposed a somewhat more limited no-strike clause on September 14, in general terms, when discussing the possibility of exchanging various proposals for final agreement. No reference to the no-strike clause was contained in Respondent's September 30 letter.

4. Non-Discrimination Clause

The Union's initial proposal of January 12 would have precluded discrimination by either party against employees and applicants for employment based upon union membership, race, color, religion, sex, age or national origin. It subsequently added marital status and handicaps to this list and sought a joint pledge of support for affirmative action. Respondent's position here, similar to that expressed in regard to the no-strike clause, was that a contractual non-discrimination clause was unnecessary because it would merely be restating existing law. Fawsett pointed out that most of Respondent's employees would be within the ambit of the anti-discrimination agencies'

[7]In some cases the same individual had filed charges with both state and federal agencies.

authority inasmuch as the work-force was made up primarily of women and minorities and repeated the Company's contention that the employees and the Union were "trigger happy" about filing discrimination charges. Fawsett stated that he felt that the employees would be inclined to grieve alleged discrimination complaints, that there would a number of such grievances which would be expensive and time consuming to the employer and said that he was reluctant to have these come within the ambit of the arbitration provision. This was a frequent topic for discussion in the negotiations and Respondent's position remained unchanged throughout.

Respondent's September 30 letter did not allude to the Union's non-discrimination proposals except to reiterate, with regard to discipline, that since this plant opened in Orlando, Florida in 1979, there had been "a history of frivolous charges filed by or on behalf of employees with the Orlando Human Relations Department and the National Labor Relations Board" which had cost the company considerable money and effort. It objected to the removal of discharges and discipline from its "list of prerogatives" and placed in the hands of an arbitrator. "The company," it said, "would be hamstrung and tied down with non-meritorious claims."

5. Discipline and Discharge

The Union's January 12 proposal provided:

> "It is understood that the Employer has the right to discipline an employee for any just and sufficient cause."

This was rejected on the basis that it would make the Employer's discipline and discharge decisions subject to the grievance and arbitration procedure which Respondent antici-

This was rejected on the basis that it would make the Employer's discipline and discharge decisions subject to the grievance and arbitration procedure which Respondent an-ticipated would ultimately be included in the contract.[8] Fawsett

[8] In fact, a grievance and arbitration procedure was agreed to.

also stated that Respondent had not received complaints from its employees about excessive or harsh discipline. The Union, he said, was seeking to make it an issue for the first time ever. The Union's protestations that it exercised discretion in the filing of grievances, were rejected. When the Union repeated that it did not take issue with proper discipline but wanted only to be involved, Fawsett sold Totzke that the Union would be informed. He again disputed Totzke's alleged assertion that the Union did not file grievances.

The Union's discharge and discipline proposal was discussed again on March 22. Fawsett's position, that he did not want any of Respondent's decisions in this area subject to the arbitral process, was repeated. When Totzke tried to convince Respondent that its proposal would facilitate management knowledge as to the fairness with which its supervisors were treating employees, general manager Eby stated that "he had an open door policy and any time an employee felt that he had a problem of that nature . . . they were welcome to come in and tell him about it."

At the 15th and 16th meetings, July 2 and July 20, the Company's position remained unchanged. The Union asked Fawsett to either agree to its proposal or to make a counter-proposal of its own. None was ever made. On July 20, Fawsett told the Union that he believed that the management rights clause, as proposed by Respondent, would permit the processing of a "grievously wrong discharge, that a discharge for false cause or something of that nature" could be handled as "an implied right" under the grievance and arbitration procedure. The Union, he said, never disputed this contention. Fawsett also pointed out that the language of the initial management rights proposal, precluding recourse to the grievance and arbitration procedure in regard to all management rights, had been deleted from the second management rights clause; he acknowledged that under either clause, discipline and discharge were reserved as management rights. Respondent's position was stated once again at the meeting of September 14 and was reiterated, in

some detail, in the September 30 letter. Once again Respondent stated its objection to third party review of its discipline and discharge decisions and repeated its contention that employees had never complained about "arbitrary, unfair or excessive discipline."

6. Seniority in Regard to Layoff and Recall

The Union's July 12 proposal contained the following language regarding layoff and recall:

> . . . In matters of lay-off for lack of work and recalling thereof, seniority based upon classification within departments shall prevail, provided the employee affected shall have the ability to adequately perform the job.

Respondent did not accept the Union's proposal; Fawsett stated that it went "much too far." He disputed Totzke's contention that the refusal was based upon an unwillingness to consider seniority as basis for layoff and recall, denied that seniority would be given no weight and argued that the dispute was over whether seniority would be given controlling weight in a layoff or recall situation. According to Fawsett, the Union's proposal would have made seniority the governing factor. When Totzke pointed to the language which provided that the employee had to have the ability to adequately perform the job, Fawsett stated that this would put every layoff into dispute, subject to arbitration.

The Union presented a second seniority proposal on February 5; its effect was similar. Employees with the skills and ability to do the work would be laid off and recalled pursuant to company-wide seniority. That proposal was rejected for the reasons stated above. On the same date, Respondent presented a seniority proposal which provided that "Seniority shall not be used for purposes of layoffs and recall, it shall be used for selection of vacation time." The Union rejected this proposal. A separate layoff and recall clause was proposed by Respondent on February 18. It provided, *inter alia:*

> Selection of employees for layoff will be at the company's sole discretion. Company-wide seniority will be considered by the company in such selection, but will not be controlling. No selection of an employee for layoff will be the subject of a grievance or of arbitration under this agreement.
>
> * * *
>
> Recall, if any, from layoff shall be at the discretion of the Employer. The Employer need not consider seniority.

This proposal provided for advance notice of layoff to employees "when possible" and notice to the Union of the names of employees laid off.[9] The Union rejected this proposal.

In the course of the discussions on this subject, Fawsett told the Union that the company had never had a layoff. Circumstances giving rise to the need for a layoff, such as the loss of customers, would, according to Fawsett, be a major economic disaster, enough of a catastrophe even without having to take its actions to arbitration. At such a time, he said, A-1 would need to retain its best employees without regard to how long they had been employed. This position was repeated in the September 30 letter, as follows:

> Moreover, we believe your concern about layoffs is excessive. The company has never had a layoff. If it did, it would be the result of a catastrophe. In such an event, the company would be compelled to undergo extreme measures, which would include retaining the best possible workforce. If any layoff were necessary, the company would need to keep the persons most productive to the company. This criterion, as you know, is sometimes, but not necessarily coincidental with seniority. Seniority would certainly be a factor to

[9] Fawsett contended that its proposals providing that employees would not lose accrued seniority by reason of being on a leave of absence was an accommodation intended "to meet the Union part way on the disparate views of handling seniority-layoff/recall matters . . ."

consider in assessing productivity of an employee, but cannot be the controlling factor. The company is not willing in this instance to make it the controlling factor. Similar considerations apply to recall.

7. Medical Leaves of Absences

The Union's initial proposal provided for leaves of absences, with one year of accrued seniority, for individuals on leaves of absence due to illness or pregnancy. Respondent disputed the need to differentiate between such leaves and those leaves of absences required for other personal reasons and did not agree. In the fifth meeting, Respondent proposed the following: "The Company may, at its sole option and discretion on a case by case basis, grant leave of absences to an employee up to 180 days. The duration of any such leave shall be at the company's discretion." By reference to its simultaneously presented seniority provision, accrual of seniority would be limited to 30 days. No separate provision was made for leaves of absence required by pregnancy, illness or injury.

Respondent had previously granted light work duty to injured or pregnant employees and had permitted employees to return to work at the conclusion of permissive leaves of absence. On February 18, at the 6th meeting, Respondent stated its intention to refuse light duty, to make leaves of absence for pregnant or injured employees mandatory and said it would no longer assure that an employee on such a leave would be allowed to return.

On March 6, the Union again proposed that employees who were ill, pregnant, injured, or otherwise disabled, be granted appropriate leaves of absences with seniority accruing up to one year. This proposal was rejected; the Union's offer to make reinstatement contingent on the ability of the employee to perform the job received no different reponse. The company's oral proposal was that an employee might be able to return if a job was available. Respondent's positions, that there would no

longer be light duty for pregnant employees and that pregnancy leave would be mandatory, were reiterated.

On May 19, Respondent and the Union agreed to a leave of absence article which provided, *inter alia*, that employees requesting a leave of absence because of illness, job related injury or other disability, including pregnancy, would be granted leaves of up to 180 calendar days, during which time their seniority would continue to accrue. Other leaves, similarly for a maximum of 180 days, would be granted at Respondent's sole option and discretion. In either case, the following was provided in regard to reinstatement:

> Reinstatement to employment following any such leave of absence will be conditioned upon verification to the Company's satisfaction of the employee's ability to perform his previously assigned duties in an unrestricted and unlimited fashion, or upon the immediate availability of another position for which the employee, in the Company's sole judgment and discretion, possesses the necessary skills, qualifications and abilities to perform the work and in which the Company wishes to place the individual.

8. Accrued Vacation Benefits

The Union presented a proposal on vacations at the first meeting. Included therein was language stating: "Employees that leave the company will collect their accrued vacation pay." The Company refused to agree to this. No agreement was reached on the proposed schedule of vacation benefits.

Respondent presented a vacation article on February 27; it contained no language on accrued vacations and was rejected by the Union.

On March 22, the Union proposed to accept Respondent's vacation schedule provided that Respondent pay voluntarily terminating employees, but not those being terminated for serious offenses, for earned but unused vacation. Respondent objected.

According to Totzke's uncontradicted testimony, Respondent stated that even employees who left amicably and for good reason, such as to better themselves, were not, in Respondent's opinion, loyal employees entitled to anything.

Respondent acknowledged that its policy had been that employees who had completed a full year of employment prior to termination would be paid for accrued and unused vacation leave upon termination but that no employee quitting in the middle of a year would receive any accrued vacation pay. Respondent denied that it threatened to reduce any vacation benefits.[10] No agreement was reached on the payment for accrued vacation benefits.

9. Meals and Rest Periods

The company's practice prior to the onset of negotiations was to grant a one hour unpaid lunch period (with a sandwich and dessert provided by the employer) and 15 minute paid breaks in the morning and in afternoon (to those employees still working during the afternoon hours).[11] The Union initially proposed a one hour paid lunch period (although that was unclear from the language of the proposal) and two 10 minute paid breaks. It verbally altered that proposal to maintain the 15 minute rest periods in effect at that time. No agreement was reached.

The Employer's proposal, dated April 17, called for a one half hour unpaid lunch period, a 15 minute paid break in the morning and a 10 minute paid break in the afternoon for employees still working at 3:30 p.m. The Union rejected this as a reduction of existing benefits.

In discussions concerning the lunch period, Respondent offered to grant a lunch break in accordance with the will of the

[10] Totzke testified that Respondent had threatened to cease any existing practice of granting vacation pay to employees who terminated prior to earning their complete vacation. The record is ambiguous as to the extent that any such practice existed and therefore fails to sustain General Counsel's contention that a reduction in benefits had been threatened.

[11] It appears that Respondent had a practice of sending employees home after a minimum of 4 hours if the necessary work had been completed.

majority of employees, either one half hour or one hour, unpaid. By agreement with the Union, a poll of the employees was conducted. They indicated their preference for a one hour lunch period and Respondent amended its proposal accordingly. The Employer's offer of June 11 codified the existing practice. The Union objected, still seeking a paid lunch period.

10. Dues Checkoff

The Union's initial proposal provided for Respondent to check off the dues of those employees authorizing same. Respondent rejected that repeatedly; Fawsett said that checkoff was "nothing more than a union security device." There was little discussion thereafter until September 14 when Pilacek asked Fawsett why Respondent would not agree. Fawsett stated that Respondent did not want dues money coming out of the employees' checks because it would make their employees' earnings appear to be less than they were while providing no immediate tangible benefits to the employees.[12] Fawsett told the Union that in view of the number of employees and the proximity of the Union's office to the plant it would be a simple matter for the Union to collect its own dues. These positions were reasserted in the September 30 letter from Eby to Totzke.

Respondent presently deducts insurance and credit union payments from the employees' pay.

11. Contract Term

When the Union presented its original proposal, Fawsett indicated that the company would prefer a one year contract term. Totzke responded affirmatively. However, neither party initialed the agreement so as to signify agreement. The matter

[12]Totzke contended that Fawsett had said that the Company wasn't going to make payroll deductions in order to support the Union. Fawsett acknowledged saying that the Union wanted checkoff as a benefit to itself. He denied rejecting it because the Company "did not want to support the Union."

was not discussed again during the course of the negotiations. Eby's September 30 letter states: "We would prefer a three year duration. We are aware that most of your contracts in the area are for 3 years, with wages provided for without the necessity of reopeners. Our wage proposal, in essence, is a sort of reopener which comes up every 6 months."

12. Wages

Since its inception in about 1957, it has been Respondent's practice to grant wage increases solely on the basis of merit, not to grant across-the-board increases. Twice annually, its owners met with the general manager and the immediate supervisors to review each employee in regard to productivity, work skill, improvement, and attendance, to determine what, if any raises, should be granted.

On December 16, 1980, Eby wrote the Union, describing Respondent's wage increase practice. In that letter, he noted that the merit wage increases were always granted in January and "usually at mid-year as well" and stated that this was a matter which required immediate action in order that it be "put into effect in January, 1981, without regard to whether a full agreement is reached by that time." He proposed that Respondent follow its usual practice in connection with the granting of the increases and offered the Union "the opportunity to bargain on and discuss the above matters and their affect on employees in the unit, in full, at an early date of your choice." He proposed meeting immediately.[13] The Union, not wishing to prevent employees from receiving wage increases, and assuming that it would have no meaningful role in the merit increase reviews, declined to participate and authorized Respondent to proceed.

The Union's initial proposal, on January 12, contained general wage increase language which called for certain

[13]The letter also indicated the need to grant wage increases to assure compliance with the increase in the federal minimum wage to $3.35 per hour, which had become effective on January 1, 1981.

minimum wages while permitting Respondent to grant wage increases above those minimums "for superior craftsmanship." On January 14, the Union submitted its proposed wage schedule wherein it proposed wage rates ranging from $4.35 per hour for production line machine operators and shipping helpers and $6 per hour for the mechanic's helpers to $339 per week for the shuttle driver. It also proposed a wage increase of 60 cents per hour (10 to about 15 percent) after six months. Additional raises were to granted for longevity.

Respondent's wage proposal, presented about January 22, was as follows:

Wages

> The parties agree that Company shall continue its existing practice of granting wage increases on the basis of merit.existing practice of granting wage increases on the basis Wages of employees are to be reviewed on a semi-annual basis, at the approximate beginning and at approximately mid-year of each calendar year, commencing at mid-year, 1981. The Union's representative will be notified prior to such review, and will be given the opportunity to participate in the said review at the Company's premises. Final decisions as to increases, if any, shall be made by the Company. In no event shall an employee be reduced below his or her hourly rate existing upon the date of execution of this contract. Wages presently in effect are as set forth on the attached Schedule A. The Company agrees to update Schedule A from time to time in accordance with updating of the seniority list.

According to Totzke, Fawsett did not further define the extent of the Union's participation in the semi-annual merit reviews. According to Fawsett, the Union representatives did not inquire as to how extensive their participation would be. Totzke

[14]This understanding appears to be borne out by Respondent's letter of September 30.

understood that Respondent intended that there should be separate negotiations in regard to the wage increase for each employee.[14] In regard to the Union's proposed wage rates, Fawsett stated that he had reviewed copies of the Union's contracts with various motels in the area and felt that Respondent's wages, paid to untrained, relatively unskilled workers, similar to certain classifications in the Union's contracts, were better than what the Union had negotiated elsewhere. The Union protested that the contracts on which Fawsett was relying were not indicative of the actual wages paid. They did not respond to Fawsett's request that he be shown the actual wages rate. Fawsett also stated that Respondent's wages were as good as or better than Respondent's competitors in the sandwich making business, all of whom were unrepresented. There was no significant discussion of wages thereafter until September 14. Although it was requested to do so several times, Respondent never presented a wage proposal different from that which it had initially made.

Around mid-year, Respondent once again notified the Union of its intention to conduct performance appraisals and grant merit increases. The Union declined Respondent's invitation to participate and indicated that it did not object to the granting of such increases at that time.

On September 14, the Union's counsel, Pilacek, attended the bargaining session and again asked why the Company had made no wage proposal or offered a wage schedule broken down by classification. Respondent said they had made a wage proposal and again explained their practice of evaluating employees and granting merit wage increases. Pilacek accused Respondent of merely going through the motions of collective bargaining and requested that Company have a wage proposal to present to the Union at the next meeting.

There was, however, no next meeting. Respondent's letter of September 30 sets forth the following as its position on wages; this position was unchanged as of at least November 3:

> First, we believe the wages being paid by us to our

employees are not only fair, but generous, in view of wages being paid to employees by our competitors in the state. Further, our wages compare favorably with wages being paid by various area employers whose employees are represented by your local union. We have not, during the years we have been in Orlando, received complaints about our wage structure, or about our manner of determining wages. As you know, in June of this year we gave wage increases after discussing the matter first with you and receiving your consent that it would be done. Our proposal regarding wages is that we continue to give increases based upon merit, with your organization having full opportunity to participate in discussions leading to each decision. The Company has a twenty-four year history of granting pay increases in this manner. It does not wish to deviate from this procedure other than to, of course, give your organization an opportunity to be notified of prospective increases and to bargain with respect to such matters.

In December, Respondent once again notified the Union of its intention to evaluate employees and grant merit wage increases. The Union did not object and declined to participate.

When asked whether Respondent ever offered to bargain with the Union over wage increase factors other than merit, general manager Eby testified: "No, they knew how we did it. We gave them the opportunity to come out and they could sit there with us and go over it in a bargaining method upon each person." Again, when asked whether Respondent intended "to allow the Union to discuss . . . factors . . . other than merit such as seniority . . .", he replied, "well, they knew that it was merit. They knew that they could come out there and sit down and discuss each individual person with us. Now, if they wanted to discuss anything else, I'm open to anything. We have been

for 24 years, this company 25, I guess it is now, this is the way that they have always done it. We have never had anybody complain about it. It seems to be working out real nice."

Analysis and Conclusions

The basic parameters of the bargaining obligation have been stated many times. In its most recent distillation of these principles, *Chevron Chemical Company*, 261 NLRB No. 4, sl. op. 8-9 (1982), the Board stated:

> . . . in ascertaining whether the duty to bargain in good faith has been complied with, it must be remembered that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession . . ." Thus, the Board does not, "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v *American National Insurance Co.*, 343 U.S. 395, 404 (1952).† On the other hand, as stated by the Supreme Court, "[T]he Board has been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole." *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO, Prudential Insurance Co.*, 361 U.S. 477, 498 (1960).

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[6] But see fn. 10, *infra*.

The Supreme Court had also stated, in *N.L.R.B.* v. *Insurance Agent's Union, supra*, at 485:

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or

> labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement.

The parties are duty-bound "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement" *(N.L.R.B.* v. *Herman Sausage Co.,* 275 F.2d 229, 231 (C.A. 5, 1960)), to "approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties." *Majure* v. *N.L.R.B.* 198 F.2d 735, 739 (C.A. 5, 1952) "The essential thing", as the Supreme Court in the *Insurance Agent's* case quoted with approval, from the Board's first annual report, "is . . . the serious intent to adjust differences and to reach an acceptable common ground."

The resolution of surface bargaining allegations, as has often been stated, never presents an easy issue. The problems are complex, "no two cases are alike", and "none can be determinative precedent for another, as good faith bargaining 'can have meaning only in its application to the particular facts of a particular case' . . ." *Borg-Warner Controls, a Division of Borg-Warner Corporation,* 198 NLRB 726, 729-730 (1972), quoting from *N.L.R.B.* v. *American National Insurance Co., supra* at 410.

As previously noted, the General Counsel's contention that Respondent engaged in surface bargaining rests almost entirely upon the terms of Respondent's bargaining proposals.[15] As stated in its Brief, Respondent contends that the controlling law in this country is that in determining whether the conduct of an employer in bargaining constitutes bad faith, the Board and courts cannot, as a matter of law, rely exclusively on the language and content of contract proposals." Respondent cites, in support thereof, *Pittsburgh-Des Moines Corporation* v. *N.L.R.B.,* 666 F.2d 1044 (C.A. 9, 1981); and *Gulf States*

[15]General Counsel also points to certain statements made at the bargaining table as indicative of bad faith.

N.L.R.B., 666 F.2d 1044 (C.A. 6, 1981); and *Gulf States Manufacturers, Inc.* v. *N.L.R.B.*, 579 F.2d 1298 (C.A. 5, 1978). There are, to be sure, restraints upon the Board's authority to find bad faith solely upon examination of a respondent's bargaining proposals, but such restraints are not absolute. In *N.L.R.B.* v. *Wright Motors, Inc.*, 603 F.2d 604, 609-610 (C.A. 7, 1979), the court stated:

> . . . Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. *N.L.R.B.* v. *Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972); *Vanderbilt Products, Inc.* v. *N.L.R.B.*, 297 F.2d 833 (2d Cir. 1961); *N.L.R.B.* v. *Reed & Prince Manufacturing Co.*, 205 F.2d 131, 134-135, 139 (1st Cir. 1953), certiorari denied, 346 U.S. 887 . . . The fact that it may be difficult to distinguish bad faith bargaining from hard bargaining cannot excuse our obligation to do so.

The court in *Wright Motors*, enforcing the Board's Order (237 NLRB 570 (1968), found "that the combination of unrealistically harsh positions adhered to by the company for six months and the avoidance of bargaining on key issues provides substantial support" for the conclusion of surface bargaining reached by the Administrative Law Judge and affirmed by the Board. The court's decision in *Wright Motors* was cited with approval in *Pease Company* for the proposition that "unusually harsh and unreasonable proposals may support a finding of bad faith bargaining" and Pease Company was cited by the Board for that same proposition in *Chevron Chemical, supra*, sl. op. 11, fn. 10. See also, *N.L.R.B.* v. *Johnson Manufacturing Company of Lubbock*, 458 F.2d 453 (C.A. 5, 1972), where the court, upon the Board's petition for civil contempt, found by the requisite standard of clear and convincing evidence that an employer's proposals and bargaining positions precisely paralleled the surface bargaining which the court had condemned in its original enforcement order (unpublished). *American Parts System*, 232

NLRB 41 (1977), is an additional example of a surface bargaining violation premised solely upon an employer's bargaining positions and proposals.

Thus, the question here is whether the evidence adduced by General Counsel, consisting primarily of Respondent's bargaining proposals and positions, *but also viewed in the light of statements indicative of Respondent's attitude toward collective bargaining,* is sufficient to establish that Respondent entered into bargaining with no real intention of concluding a final and binding collective bargaining agreement. I must conclude that it is.

Of principal importance leading to the foregoing conclusions is the wage proposal to which Respondent adhered throughout negotiations.[16] Pursuant to that proposal, A-1 *would not consider any modification in the basic wage rates paid to its employees* and would permit the Union only to participate in a burdensome one-by-one review of the employees for merit. Moreover, the Union's participation would be limited to observation, suggestion or prayerful entreaty since, pursuant to the Respondent's wage proposal and its concurrently proposed management rights and no-strike clauses, Respondent would retain the exclusive right to evaluate employees, its decisions on wage rates would be final, it would have the unilateral right to terminate or modify bonus or work incentive plans, and the Union would be precluded from striking to enforce its wage demands. Respondent contends, on brief, that even assuming that it insisted on complete control over wages, no violation may be found because "it is common knowledge that any final decision on amounts of compensation rests exclusively with the employer . . ." Respondent would thus ignore its statutory obligation to *negotiate* with its employees representatives and would further ignore or preclude the Union's statutory right to engage in meaningful negotiations, including its right to exert economic pressure in support of its demands. Respondent's

[16] In reaching this conclusion, I deem it immaterial whether A-1's wages were generous or penurious or whether the Union's demands were modest or outrageous.

attitude toward bargaining over wages is further revealed in the testimony of Eby. When asked whether Respondent had ever offered to bargain over wage factors other than merit, he replied, "No, they knew how we did it." His additional statement, to the effect that this was how it had been done for 25 years without complaint from the employees, tends to indicate a mind closed to the possibility of change, notwithstanding his self-serving statement that if the Union "wanted to discuss anything else, I'm open to anything," and further ignores the fact that a majority of the unit employees voted for union representation, an effective way for employees to register discontent with the way things were being done.

I conclude from all of the foregoing that, in essence, A-1 has refused to negotiate in good faith with the Union in regard to wages, a mandatory subject of bargaining. *Wright Motors, supra.*

Similarly, examination of Respondent's other proposals, particularly as they interrelate, reveals that Respondent was insisting in retaining to itself *total control* over virtually every significant aspect of the employment relationship. Thus, under its proposals, Respondent sought to retain exclusive and unbridled control over discipline and discharge and both layoff and recall; moreover, discipline/discharge matters were implicitly excluded from the grievance and arbitration procedure[17] and layoff/recall matters were expressly excluded.[18]

Respondent also insisted that it retain the right to unilaterally change the employees' working conditions generally, and more specifically in regard to, *inter alia,* the setting or establishment of work rules and regulations, the making and implementation of time studies, subcontracting or otherwise transferring the

[17] Fawsett's assurances that a "grievously wrong discharge" would impliedly to be subject to arbitration appears to be without any warrant in law or practice.

[18] I note, additionally, Eby's statement rejecting the Union's argument that subjecting disciplinary matters to the grievance procedure would enable management to better know how its supervisors were treating employees. His reference to "an open door policy" and to employee rights to come and talk to him is an implicit negation of the Union's statutory role in such matters. Moreover, Fawsett's claim that Respondent had never received employee complaints about discipline ignores the implications of the affirmative vote for representation.

work of unit employees to others and the establishment of rules and regulations pertaining to safety. In none of these areas would the Union have any voice. Thus, notwithstanding Fawsett's repeated oral assurances when discussing the proposed Exclusiveness Clause, that Respondent was not attempting to preclude its obligation to notify and bargain with the Union concerning changes in terms and conditions of employment, Respondent's management rights proposal would even deny the Union notice that such actions were going to be taken so that it might endeavor to persuade Respondent to follow a different course of action. Even Respondent's past practices would not limit the extent to which it would be authorized to exercise "complete freedom." Moreover, even when the Employer's conduct constituted a violation of law, such as under the NLRA or various anti-discrimination statutes, the Union would be precluded from either grieving the violation or seeking to remedy it by the exercise of economic power, a strike.

Based upon all of the foregoing, *I am convinced that throughout the negotiations, Respondent maintained a state of mind inconsistent with a willingness to reach genuine agreement with the Union* and was engaging in "surface bargaining" in violation of Section 8 (a) (5) and (1) of the Act. As has previously been stated by the Board in similar situations, "the company's proposed contract in effect 'would strip the Union of any effective method of representing its members . . . further excluding it from any participation in decisions affecting important conditions of employment . . . thus exposing the company's bad faith.' " *American Parts System,* 232 NLRB 41, 47-48 (1977), quoting from *San Isabel Electric Services, Inc.* 225 NLRB 1073, 1080 (1976). In *San Isabel,* as here, the employer's management rights clause would have precluded the union's participation in such significant areas as the establishment of work and safety rules and the Board referred to the employer's insistence upon such a management rights clause as a

"smokescreen . . . to conceal an effort to exclude the Union" from the participation to which it was statutorily entitled.

The Board's decision in *Hospitality Motor Inn, Inc.*, 249 NLRB 1036 (1980), enf. 667 F.2d 562 (C.A. 6, 1982) is of particular relevance to the instant discussion. There, the employer insisted upon a management rights clause not nearly as broad as A-1 had proposed, under which it would retain:

> . . . the *sole right*, to transfer, suspend, and discharge employees for any reason; to make and enforce rules; to determine the prices of products and services sold and furnished to the employees; to determine volume and rate of production; to redetermine the number and location of its operations and to discontinue operations; to subcontract work; and to establish new job classifications and rates of pay. In addition to reserving these and other enumerated rights, the management-rights proposal states that the Company 'retains all rights not otherwise specifically covered by this Agreement.' 1040

Additionally, in terms similar to those present in the instant case, that employer objected to the imposition of a "just cause" standard for discharge and to the arbitration of discharges, *opposed for "philosophical" reasons dues checkoff,*[19] and rejected the Union's proposed anti-discrimination clause. The Board and the court affirmed the Administrative Law Judge's conclusions that: the assertion of "philosophical" objections does not satisfy the statutory obligation to bargain about union security; "that one is impelled to question the good faith of a bargaining position that anti-discrimination provisions are unnecessary because the 'law' already prohibits such conduct"; and that the "totallity of its conduct — including, *inter alia*, its positions as to union-security, dues-checkoff, management rights, individual contracts, and no-discrimination provisions — also establishes that Respondent engaged in bargaining without a good-faith in-

[19] Respondent's objections to checkoff are in the same vein. See, also *American Steel Building Co., Inc.*, 208 NLRB 900 (1974).

tent and effort to 'resolve differences and reach a common ground' " in violation of Section 8 (a) (5) and (1) of the Act.

While it would be virtually impossible to find one case involving allegations of surface bargaining to be "on all fours" with another, *Wright Motors, supra,* comes remarkably close. Therein, the Administrative Law Judge, whose rulings, findings and conclusions were affirmed by the Board, found that:

> . . . Some of the employer's proposals would have put the employees in a far worse position with the Union than without it. Others would have so damaged the Union's ability to function as the employees' bargaining representative that the employer's representative could not seriously have expected that they could result in serious and meaningful collective bargaining.

Among the "more flagrant ones" pointed to were: " a lengthy management rights clause, not subject to the grievance procedure which gave the Company exclusive control over hours, work rules, and production, and authorized the Company to subcontract, curtail or shut down its business completely without regard to the effect on employees";[20] and "extraordinary no strike-no lockout clause";[21] and article which provided for only limited and permissive arbitration; and left the hourly wage rates and promotions to be set at the company's sole discretion. The Administrative Law Judge and the Board

[20] Here, after soliciting the Union's objection to its language excluding management rights from the grievance and arbitration machinery, Respondent dropped that language and replaced its management rights clause proposal with another lengthier and more detailed proposal which made access to the grievance machinery essentially illusory.

[21] *Wright Motors'* proposal required that Union fines be imposed on striking employees, imposed personal and institutional liability on the union and its officers, set both liquidated and actual damages, and limited both the union's legal rights and the arbitrator's authority. Respondent's proposal was no less extraordinary; it did not preclude lockouts, it precluded strikes in regard to actual violations of law (which were also excluded from the grievance machinery) and it subjected striking employees to immediate discharge without recourse to the grievance procedure. See *San Isabel Electric Services, supra,* at fn. 7, and cases cited therein, where the Board stated:

> We have consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure.

concluded that respondent had "embarked upon a plan or strategy to frustrate and insure the failure of the collective bargaining process by . . . engaging in surface bargaining with no sincere intention of reaching agreement" in violation of Section 8 (a) (5) and (1). The Administrative Law Judge and the Board further found that Respondent had violated Section 8 (a) (5) by delaying meetings and by delaying submission of data to the union. The Circuit Court rejected the Board's findings of violation based upon the delay of meetings and the delay in the furnishing of information and enforced the Order based entirely upon the surface bargaining conclusion. Pointing out that where (as here) sophisticated parties are involved, "the only indicia of bad faith may be the proposals advanced and adhered to", the court stated, at pages 609-610:

> We share the concern of the ALJ and the courts in *Gulf States Manufacturers, Inc.* v. *N.L.R.B., supra,* and *N.L.R.B.* v. *Tomco Communications, Inc., supra,* that neither the Board nor the courts should sit in judgment on the substantive terms offered by parties negotiating in good faith. It is equally clear, however, that the Union has an enforceable right to good faith bargaining. (Citations omitted.) . . .

The court held that "the combination of unrealistically harsh positions adhered to by the company for six months and the avoidance of bargaining on key economic issues provides substantial support for the ALJ's conclusion."[22]

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[22] The Seventh Circuit distinguished the decisions of the Fifth Circuit in *Gulf States* and the Ninth Circuit in *Tomco* on grounds entirely applicable to the instant case. Thus, it pointed out that in *Gulf States* the employer had established that its proposals were not so outrageous that they could not have been made in good faith by demonstrating numerous agreements incorporating substantially similar provisions. No such demonstration was made in the instant case. The Seventh Circuit further pointed out that in *Wright Motors,* as in the instant case, the record did not reveal bona fide concessions on substantial issues such as might refute an accusation of bad faith and show that the employer was not merely being intransigent. The "concessions" or agreements made by the Employer in the instant case closely parallel those of the Employer in *Wright Motors* and are distinguishable from those made by the employer in *Gulf States.* In regard to *Tomco,* the *Wright* court pointed out that the ALJ had found bargaining in good faith up to the point when the parties reached impasse on wages and the court found no substantial evidence upon which the Board could have reversed the Judge's findings. It was noted that, even then, the *Tomco* Court had cautioned that a bargaining proposal could contain terms so hostile as to evidence bad faith.

In the instant case, as in *Wright Motors*, Respondent's proposals, if accepted, would have left the Union and the employees with substantially less rights and protection than they would have had if they had relied solely upon the certification. Without agreeing to Respondent's proposal, the Union had the right to prior notice and bargaining concerning all changes or modifications in terms and conditions of employment and it retained the right to strike in protest of such actions and in protest of conduct violative of the employee's other legal rights. Acceptance of Respondent's proposal would have denied the Union even of the right to notice concerning such fundamental matters as the elimination of some or all of the unit jobs. Could sophisticated counsel have any reasonable expectation of agreement to proposals which would delete those rights, particularly when there was not even the offer to maintain the *status quo* in regard to existing working conditions? I do not believe so and I must therefore conclude that Respondent intended "to frustrate and insure the failure of the collective-bargaining process." *Wright Motors, supra.* See also, *N.L.R.B.* v. *Johnson Manufacturing Company of Lubbock, supra,* and *Majure* v. *N.L.R.B., supra; American Steel Building Co., Inc., supra.*[23]

General Counsel further contends that Respondent's bad faith is established by its proposal of articles which would reduce employee benefits.[24]

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[23] Indeed, it may seriously be questioned whether a proposal wherein one party retains the right to unilaterally change virtually every significant aspect of the working relationship during that "contract's" term, while the other party is rendered helpless to oppose such actions, is a proposal for a *collective-bargaining agreement.* See *Appalachian Shale Products Co.,* 121 NLRB 1160, 1163-1164 (1958), wherein the Board, in restating its contract bar rule, stated:

> . . . to serve as a bar to a new representation petition, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship . . .

The Board pointed out that:

> . . . real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems.

These requirements have been consistently adhered to. *Stur-Dee Health Products, Inc.* 248 NLRB 1100 (1980); *J. P. Sand and Gravel Co.,* 222 NLRB 83 (1976); *Raymond's Inc.,* 161 NLRB 838 (1966).

[24] I have previously found that the evidence in regard to Respondent's practice regarding payment for accrued vacation benefits was too ambiguous to support a finding of violation. This contention warrants no further consideration.

The evidence establishes that, in the course of discussions concerning leaves of absences, Respondent indicated its intention to make pregnancy leaves mandatory, to deny light duty to pregnant or injured employees and to deny such employees any assurance of recall at the conclusion of their leaves of absences, all contrary to past practice. In the leaves of absence article to which the parties ultimately agreed, there was language impliedly entitling laid off employees to reinstatement provided that they met certain conditions. Nothing further was said about light duty or the mandatory nature of pregnancy leaves. The evidence further establishes that Respondent initially proposed a reduction in the length of the unpaid lunch period and the paid afternoon rest break. The Employer's ultimate proposal was to maintain the *status quo.* No agreement was reached.

The foregoing, in and of themselves, do not rise to the level of a refusal to bargain. They do, however, shed some light on the Respondent's motivation and I have so considered them.

General Counsel further contends that Respondent evidenced its bad faith by reneging on an agreement as to the contract's term. This contention is rejected. The matter was little discussed and the record is insufficient to establish that agreement on this issue had ever been reached.

Conclusions of Law

1. The Union is the certified bargaining agent for Respondent's employees in the following appropriate unit:

> All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

2. Respondent violated Section 8 (a) (5) and (1) of the Act by bargaining with the Union in bad faith with no intention of entering into any final or binding collective bargaining agreement.

3. The Unfair labor practice found herein affects commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in the unfair labor practice set forth above, I recommend that it cease and desist from such conduct or like or related conduct and take affirmative action to effectuate the policies of the Act. I shall also recommend that Respondent be ordered to bargain collectively in good faith, upon request, with the Union as the exclusive bargaining representative of its employees in the above unit; in the event that an understanding is reached, to embody such understanding in a signed agreement; and to post the attached notice.

In order to ensure that the employees will be accorded the statutorily prescribed services of their elected bargaining agent for the period provided by law, I shall recommend that the initial year of certification begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. *Southern Paper Box Company,* 193 NLRB 881, 883 (1971).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

Order[25]

The respondent, A-1 King Size Sandwiches Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Hotel, Motel, Restaurant

[25] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Employees & Bartenders Union, Local 737, by bargaining with the Union in bad faith with no intention of entering into any final or binding collective bargaining agreement. The appropriate unit is:

> All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act:

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above named Union as the exclusive bargaining representative of its employees in the above described unit, and embody in a signed agreement any understanding reached. The initial year of the Union's certification as the exclusive bargaining representative of the employees in the above designated unit will begin on the date the Respondent commences bargaining in good faith with the Union as such representative.

(b) Post at its establishment in Orlando, Florida, copies of the attached notice marked "Appendix B."[26] by the Regional director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted.

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[26] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. August 18, 1982.

Michael O Miller
Administrative Law Judge

APPENDIX A

ARTICLE
MANAGEMENT RIGHTS

1. *Reservation of Rights.* The Company exclusively reserves all rights, powers and authority customarily exercised by management, except as expressly limited or modified by clear, specific provisions of this agreement.

2. *Prior Rights.* Before the Union became the representative of the employees covered by this agreement, the Company had the right to deal with its employees with complete freedom, except as its rights were bounded and limited by the general laws. By this agreement, the Company and the Union have agreed to certain limitations on those rights. However, it is the intention of the parties hereto that the Company retain, and the Company does retain, each and every right, power and privilege that it ever had enjoyed, whether exercised or not, except insofar as it has, by express and specific terms of this agreement, agreed to limitations.

3. It is agreed that the Company shall have authority to determine and from time to time redetermine, and direct the policies, mode and methods of performing all its work of any sort, without any interference in the management and conduct of the Company's business on the part of the Union or any of its representatives. Except as expressly limited by a specific provision of this agreement, the Company shall continue to have the exclusive right to take any action it deems necessary or appropriate in the management of the Company and the direction of its work force. All inherent and common law management rights and functions which the company has not expressly modified or restricted by a specific provision of this agreement are retained and vested exclusively in the Company. Such rights exclusively reserved to the Company shall include, but are not limited to, the right to determine the qualifications for and to select its employees; to determine the size and composi-

tion of its working forces; to determine work schedules and all methods of production; to assign overtime work; to determine the number and types of equipment, processes, materials, products and supplies to be used, operated or distributed; to hire, retire, promote, demote, evaluate, transfer, suspend, assign, direct, lay off and recall employees; to reward or to reprimand, discharge or otherwise discipline employees; to maintain efficiency of employees; to determine job content and minimum training qualifications for job classifications and the amounts and types of work to be performed by employees; to establish and change working rules and regulations; to engage in experimental and developmental projects; to establish new jobs and to abolish or change existing jobs; to increase or decrease the number of jobs or employees; to determine whether and to what extent the work required in its operations shall be performed by employees covered by this agreement; to use supervisors or other non-unit employees to perform work of the kind performed by employees of the unit; to determine the assignment of work; to schedule the hours and days to be worked on each job and each shift; to discontinue, transfer, or assign all or any part of its functions, services, production or other operations; to open new facilities and transfer its operations or any part thereof to new facilities; to subcontract any part of the Company's work; to make time studies of work loads, job assignments, methods of operation and efficiency from time to time and to make changes based on said studies; to expand, reduce, alter, combine, tansfer, assign, cease or create any job, job classification, department or operation for business purposes; to institute, modify or terminate any bonus or work incentive plan; to control and regulate or discontinue the use of supplies, machinery, equipment, vehicles and other property owned, used, possessed or leased by the Company; to make or change rules, policies and practices not in conflict with the provisions of this agreement; to alter or vary past practices; to introduce new, different or improved methods, means, processes, maintenance, service and operations; to make rules and regula-

tions for the purpose of efficiency, safe practices and discipline; and otherwise generally to manage the business, direct the work force, and establish terms and conditions of employment, except as expressly modified or restricted by a specific provision of this agreement. The Company's failure to exercise any function or right hereby reserved to it, or its exercising any function or right in a particular way, shall not be deemed a waiver of its rights to exercise such function or right, nor preclude the Company from exercising the same in some other way not in conflict with the express provisions of this agreement. The Union agrees that the Company may exercise all of the above without advising the Union of any such proposed action, change or modifications; nor shall the Company be required to negotiate over the decision or its effects on the employees, except as altered by this agreement.

4. In interpreting this agreement there shall be absolute and complete regard for the rights, responsibilities and prerogatives of management. This agreement shall be so construed that there shall be no interference with such rights, responsibilities and prerogatives except as may be expressly provided in this agreement. Past practices of the Company shall not be considered for the purpose of limiting the rights, responsibilities or prerogatives of management, nor for the purpose of enlarging upon the specific and express limitations on management which are contained in this agreement.

Office-Supreme Court, U.S.
FILED
OCT 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-268

In the Supreme Court of the United States

OCTOBER TERM, 1984

A-1 KING SIZE SANDWICHES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board was warranted in finding that petitioner was not seeking in good faith to reach agreement with the Union and that petitioner accordingly violated its obligation to bargain in good faith within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A18) is reported at 732 F.2d 872. The decision and order of the National Labor Relations Board (Pet. App. A19-A59) is reported at 265 N.L.R.B. 850.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3-A4) was entered on May 21, 1984. The petition for a writ of certiorari was filed on August 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

1. Petitioner produces sandwiches and pies on an assembly line at its facility in Orlando, Florida, and it sells and delivers those items to convenience stores (Pet. App. A8, A24). In 1979, petitioner's employees, in a unit consisting of some 50 to 60 production and maintenance employees, truck drivers, and shipping helpers, voted to be represented by the Hotel, Motel, Restaurant Employees and Bartenders Union, Local No. 737 (the Union). Petitioner unsuccessfully challenged the Board's certification of the Union through a refusal to bargain; and in January 1981, after the Board's order was upheld by the court of appeals, petitioner and the Union commenced a series of negotiating sessions for a collective bargaining agreement. *Id.* at A8-A9, A25.

During 18 sessions occurring over an 11-month period, petitioner and the Union each presented proposals on a number of subjects, but agreement was reached only as to a union recognition clause, clauses governing rights, duties, and other matters concerning Union representatives, pay when on jury duty, leaves of absence, rules for the Union's access to plant bulletin boards, and an arbitration and grievance procedure for any matters made subject to such a procedure (Pet. App. A9, A25-A26). As to other subjects, petitioner rejected various tradeoffs proposed by the Union in the next-to-last meeting, held in September 1981; and, in a letter dated September 30, petitioner reiterated its proposals on the sig-

nificant subjects dividing the two sides and stated that no modified proposals were contemplated. No new proposals were thereafter offered by petitioner. *Id.* at A30, A32, A33, A35-A36, A37-A38, A41, A44-A45.

The proposals on which petitioner insisted included a management rights clause that asserted petitioner's control over a long list of enumerated subjects and over every right and power petitioner had ever enjoyed, except insofar as any limit was established by an express and specific term of the agreement (Pet. App. A12-A13, A29-A30, A60-A62). This final clause on which petitioner insisted was more extensive in its coverage than the clause petitioner initially proposed (*id.* at A16, A29). The procedures for grievance processing and arbitration applied to no significant action affecting employees. This was so because of petitioner's refusal to agree to a nondiscrimination clause or a discharge and discipline clause and petitioner's insistence that any clauses on wages, layoffs or recalls acknowledge its sole discretion (*id.* at A12-A13, A14-A15, A33-A38, A50). Petitioner's representatives stated during the course of bargaining that subjecting disciplinary matters to a grievance procedure was unnecessary because management had an "open door" policy pursuant to which employees could discuss their problems directly with the executive vice-president and because, in any event, no employees had ever complained about unfair discipline (see *id.* at A50 n.18; Tr. 34).

Petitioner insisted on a no-strike clause that prohibited "any strike, either primary or sympathy, slowdown, boycott, picketing, or other work interruptions, for any reasons, including but not limited to, alleged or actual unfair labor practices" (Pet. App.

A32-A33). Petitioner also insisted on an "exclusiveness," or "zipper," clause in which the parties would waive, during the life of the agreement, any right to bargain on any subject that "could be interpreted under existing law as a mandatory or permissive subject of bargaining" (*id.* at A13-A14, A30-A32). This clause, too, was broader than petitioner's initially proposed zipper clause (*id.* at A16, A31, A32). Petitioner also declined to consider the inclusion of any provision for union dues checkoff (*id.* at A15, A41).

Regarding wages, petitioner declined to make any proposal for a general wage increase; instead it insisted on continuing its established system of semi-annual merit wage reviews.[1] Under petitioner's wage proposal, a Union representative could participate by sitting in on each employee's wage review, but petitioner would make the final decision. Petitioner would be barred, during the term of the agreement, from reducing an employee's wages below his or her hourly rate as of the agreement's execution, but nothing in petitioner's proposed agreement would bar petitioner from taking away previously awarded merit increases at will, so long as the employee's wage rate did not sink below that initial baseline. Pet. App. A11, A42-A46.

2. The Board, adopting the decision of the Administrative Law Judge, found that petitioner's pro-

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[1] Although petitioner's executive vice-president professed at the unfair labor practice hearing to be "open to anything," he also responded to the question whether he would allow the Union to discuss any factors other than merit with the explanation that "they knew it was merit" and that the merit system was the way petitioner had "always done it" for nearly 25 years without any complaint from employees (Pet. App. A50; Tr. 168).

posals, considered as a whole, represented a demand for retention of "*total control* over virtually every significant aspect of the employment relationship," while eliminating the Union's statutory right to notice and an opportunity to bargain over changes in terms and conditions of employment and its freedom to strike over even violations of the law (Pet. App. A19-A20, A50, A51; emphasis in original). Given the various restrictions on employees' statutory rights and the absence of any express limitation on management authority that would make the grievance procedure applicable, the Board found that the Union's participation in the wage review process "would be limited to observation, suggestion or prayerful entreaty" (*id.* at A49). The Board noted that in testimony at the unfair labor practice hearing and through statements made during the period of bargaining, petitioners' representatives manifested a mind-set closed both to serious consideration of changes in the system for determining wage rates (*id.* at A50) and to acceptance of the Union's role as a spokesman for employee grievances (*id.* at A50 n.18). The Board also found that the totality of petitioner's proposals "if accepted, would have left the Union and the employees with substantially less rights and protection than they would have had if they had relied solely upon the certification" (*id.* at A55). The Board concluded that "the evidence adduced by General Counsel, consisting primarily of [petitioner's] bargaining proposals and positions, *but also viewed in the light of statements indicative of* [*petitioner's*] *attitude toward collective bargaining*, is sufficient to establish that [petitioner] entered into bargaining with no real intention of concluding a final and binding collective bargaining agreement"

(*id.* at A49; emphasis in original), and therefore that petitioner had "engag[ed] in 'surface bargaining' in violation of Section 8(a)(5) and (1) of the Act," 29 U.S.C. 158(a)(5) and (1) (Pet. App. A51, A56).

3. The court of appeals enforced the Board's order (Pet. App. A3-A18). It defined the issue as whether "the content of [petitioner's] bargaining proposals together with the positions taken by [petitioner] are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement" (*id.* at A10). The court agreed with the Board that petitioner's proposals, read together, "would have left the Union and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union's certification" (*id.* at A16; citation omitted). It also noted that petitioner had responded to the Union's objections to its initial management rights proposal and its zipper clause by proposing even broader clauses on those subjects (*ibid.*). Petitioner's manner of bargaining on those two proposals, the court observed, was "clearly" an indication that it "had little desire to work towards agreement"; and the court also concluded that the Board "correctly inferred bad faith" from petitioner's "unusually harsh and unreasonable" proposals, considered as a whole (*id.* at A8, A16).

ARGUMENT

Petitioner does not take issue with the Board's conclusion, upheld by the court of appeals, that its collective bargaining proposals, taken as a whole, would have left the employees with fewer rights than they enjoyed simply as a consequence of the Board's certification of the Union as their bargaining repre-

sentative. Rather, petitioner asserts (Pet. 4-6) that under no circumstances may the Board base a finding of a violation of Section 8(a)(5) of the Act simply on the content of the proposals an employer insists on as the price of an agreement, so long as none of the proposals is in itself illegal.[2] But the question whether the Board is subject to such an inflexible rule in determining whether a party is bargaining in good faith is not presented on this record, because in this case there was evidence, *in addition to* the final proposals themselves, indicative of a mind-set incompatible with a desire to reach agreement with the Union. Moreover, contrary to petitioner's contention (Pet. 5-6), the decision below is not inconsistent with decisions of this Court or the law of other circuits.

1. Section 8(a)(5) and Section 8(d) of the Act, 29 U.S.C. 158(a)(5) and (d), together impose the duty to bargain in good faith by meeting at reasonable times and conferring "in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." Section 8(d) also provides that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." Construing

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[2] Petitioner took a somewhat different position in the court of appeals, where it stated (C.A. Br. 36): "A-1 does not contend that under no circumstances, as a matter of law, can a set of proposals, by their language alone, without other acts or conduct, constitute sufficient evidence of intent not to reach agreement. A-1 submits, however, that there would have to be something outrageous, egregious and hostile about proposals advanced and insisted on which is not suggested to exist in this case before mere proposals, without other conduct, constitute surface bargaining."

that provision of Section 8(d), this Court has held, in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409 (1952), that bargaining for a management rights clause cannot be held a per se violation of the Act, and it has held, in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), that the Board lacks the power to remedy a violation of the duty to bargain with an order that the violator agree to a particular contract clause.

This Court has recognized, however, that Congress intended to impose on both negotiating parties a duty "to confer in good faith with a desire to reach agreement" (*NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960)), and that "the Board has been afforded flexibility to determine * * * whether a party's conduct at the bargaining table evidences a real desire to come into agreement" (*id.* at 498). The Court has never held that the Board is barred from inferring from the totality of a party's proposals that it has no genuine desire to reach an agreement and from concluding that the party thereby violates the good faith bargaining obligation imposed by the Act. Indeed, Justice Harlan, in his concurring opinion in *H.K. Porter*, specified that he joined the Court's opinion restricting the Board's remedial power "on the understanding" that nothing said in the opinion would disturb the Board's "primary determination" that the employer "did not bargain in 'good faith,' and thus may be subjected to a bargaining order enforceable by a citation for contempt if the Board deems such a proceeding appropriate" (397 U.S. at 109-110).

In accordance with this Court's decisions, the Board seeks to avoid stepping over the line into regulation of the terms of a labor agreement, and thus

will not fault an employer for mere "hard bargaining." *Chevron Chemical Co.*, 261 N.L.R.B. 44, 46 (1982). In view of its duty to determine whether a party is bargaining with a genuine desire to reach agreement, however, the Board has stated that "unusually harsh, vindicative, or unreasonable proposals may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith" (*id.* at 46 n.10). See also *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 610 (7th Cir. 1979). In the present case, both the Board and the court of appeals found that petitioner's total package of proposals was less advantageous to the Union than simply retaining the rights flowing from certification alone. The Board also found that petitioner's representatives had made statements regarding the wage system and about the employees' ability to talk directly to management about grievances that were indicative of bad faith (see pages 3, 4 note 1, *supra*), and the court of appeals noted that petitioner's approach to bargaining on the management rights clause and the zipper clause was to submit second proposals that were more sweeping than its original proposals (see pages 3, 4, 6, *supra*). On this record, the Board did not run afoul of this Court's admonitions against undue intrusion into the bargaining process when it concluded (Pet. App. A49; emphasis in original) that "the evidence adduced by General Counsel, consisting primarily of [petitioner's] bargaining proposals and positions * * * *viewed in the light of statements indicative of* [*petitioner's*] *attitude toward collective bargaining*, is sufficient to establish that [petitioner] entered into bargaining with no real intention of concluding a final and binding collective bargaining agreement."

2. The decisions cited by petitioner (Pet. 8-13) as presenting a conflict appropriate for resolution by this Court are all distinguishable from the present case.

In *Struthers Wells Corp.* v. *NLRB*, 721 F.2d 465 (1983), the Third Circuit criticized the Board for predicating a finding of a Section 8(a)(5) violation on an employer's negotiating proposals in three specific areas (merit wage increase reviews, posting and bidding procedures, and work jurisdiction); by inferring bad faith from those three lawful proposals, the court held, the Board disregarded this Court's admonition against compelling contractual concessions and sitting " 'in judgment upon the substantive terms of collective bargaining' " (721 F.2d at 470, quoting *American National Insurance Co.*, 343 U.S. at 404). In *Struthers Wells*, however, there was no evidence of conduct other than the content of the contract proposals; for example, in contrast to the present case, there were no statements by management representatives suggesting bad faith, and the employer did not change its proposals for the worse during the course of bargaining. Moreover, the employer in *Struthers Wells* was offering increases in various fringe benefits in exchange for its request for modifications of the existing bargaining agreement that would give it unilateral control over wage increases and certain working conditions. *Struthers Wells Corp.*, 262 N.L.R.B. 1080, 1085 (1982). The court of appeals in *Struthers Wells* thus did not confront a case in which the proposed agreement would leave the employees less well off than they would be if no agreement were reached and in which other evidence indicative of bad faith was adduced.

In *United Steelworkers* v. *NLRB*, 441 F.2d 1005 (D.C. Cir. 1970),[3] as petitioner notes (Pet. 11), the court remanded for reconsideration a case in which the Board, in the court's view, had improperly weighed the economic benefits offered by the employer against the waivers of employee rights demanded by the employer (441 F.2d at 1009-1010); but the court took care not to disagree with the proposition that the Board would be within proper bounds in concluding that a proposal is " 'so disadvantageous * * * as to call into question [an employer's] willingness to sign any agreement' " (*id.* at 1010; citation omitted). Moreover, in *NLRB* v. *Blevins Popcorn Co.*, 659 F.2d 1173 (1981) (on contempt), the District of Columbia Circuit has made it clear that it does not accept the inflexible rule for which petitioner here contends; the court there stated that "[r]igid adherence to disadvantageous proposals may provide a basis for inferring bad faith" (*id.* at 1188; citations omitted). Judge Tamm, the author of the opinion in *United Steelworkers*, concurred in the *Blevins* result; while he emphasized that adamant insistence on a bargaining position could not, in itself, constitute bad faith so long as there is " '*some* reasonable effort in *some* direction' " (659 F.2d at 1191, quoting *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir.), cert. denied, 346 U.S. 887 (1953) (emphasis in original)), he cited with apparent approval a commentator's suggestion that where findings of a failure to bargain in good faith are predicated on a party's substantive positions, they generally occur in those cases in which " 'the employer is insisting upon

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[3] Petitioner cites this decision by the name of the companion case, *NLRB* v. *Florida Machine & Foundry Co.*

a set of terms which would place the employees and the union in a worse (or no better) economic position than had there been no contract at all' " (659 F.2d at 1192, citing R. Gorman, *Basic Text on Labor Law* 489 (1976)).[4]

In three of the Ninth Circuit cases relied on by petitioner (Pet. 9-10), the court stated that the Board can never make a finding of a failure to bargain in good faith on the basis of the terms of contract proposals alone. *Pittsburgh-Des Moines Corp.* v. *NLRB*, 663 F.2d 956, 959 (1981); *Seattle-First National Bank* v. *NLRB*, 638 F.2d 1221, 1226 (1981); and *NLRB* v. *Pacific Grinding Wheel Co.*, 572 F.2d 1343 (1978).[5] It is not clear, however, that even this proposition represents the law of the circuit; in *NLRB* v. *Mar-Len Cabinets, Inc.*, 659 F.2d 995

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[4] In *NLRB* v. *Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982), the only questions before the court were whether an employer's unilateral cessation of payments to an employee fringe benefits fund violated Section 8(a)(5) and (1) of the Act and, if so, whether the Board had improperly failed to consider whether there had been subsequent bargaining to impasse that would terminate the employer's ongoing liability. The remarks on which petitioner relies (691 F.2d at 1026 n.5) are pure dictum.

[5] The Ninth Circuit did not, in *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871 (1978), make that same sweeping statement, although it did fault the Board for improperly sitting in judgment on the desirability of the employer's proposals. 567 F.2d at 883-884. The court distinguished various surface bargaining cases, including *NLRB* v. *Johnson Manufacturing Co.*, 458 F.2d 453 (5th Cir. 1972), on which the court of appeals in the present case strongly relied (Pet. App. A16-A17), by stating (567 F.2d at 883) that those cases all involved "much more aggravated behavior on the part of management than is present here."

(1981), a Ninth Circuit panel, although advising caution "in inferring motivation from proposal content," nonetheless observed that "proposal content supports an inference of intent to frustrate agreement where, as here, the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible." *Id.* at 999.

In any event, even if the law of the Ninth Circuit were that the Board cannot find a failure to bargain in good faith on the basis of a party's proposed contract terms alone, that principle, as we noted, would not require a different result in this case. As we have shown, in this case both the Board and the court of appeals relied on evidence of bad faith in addition to the terms of the proposals insisted upon. Although the court in *Pacific Grinding Wheel* said that proposals alone could not warrant a bad faith finding, it agreed that the record as a whole supported the Board's conclusion that the employer had not bargained in good faith. In the other two cases, the circumstances were clearly unlike those of the present case. In *Pittsburgh-Des Moines*, the court simply disagreed with the Board's finding that the employer had reneged on a tentative agreement and then advanced new and more regressive proposals in its place; the court concluded that the evidence showed that the union's claim that a contract had been agreed upon was unwarranted and that the union had thereafter unreasonably refused to listen to the employer's explanations of its positions. 663 F.2d at 959-960. In *Seattle-First National Bank*, the Board had found that the "economic aspects" of the employer's offer were "not niggardly," but it had inferred

bad faith from the employer's proposals "in non-economic areas" (241 N.L.R.B. 753, 760-762 (1979)); the court found this an inadequate basis for a finding of refusal to bargain in good faith, and it remanded the case for consideration whether other evidence in the case, when added to the findings based on proposals, would support an ultimate finding of bad faith.[6]

Thus, in none of the cases on which petitioner relies did the court of appeals confront the question whether bad faith could be inferred from a set of proposals that might fairly be characterized as less advantageous than no contract at all in a context of other evidence of bad faith. The opinions of the Ninth Circuit and the other courts of appeals indicate that, on such a record, they would be prepared to uphold a finding of a failure to bargain in good faith. There is, accordingly, no conflict requiring resolution by this Court.

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[6] After remand from the Ninth Circuit, the Board concluded there was no additional evidence of bad faith, and it dismissed the complaint. *Seattle-First National Bank*, 267 N.L.R.B. No. 142, 114 L.R.R.M. (BNA) 1072 (Aug. 26, 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-268

SUPREME COURT OF THE UNITED STATES
October Term, 1984

A-1 KING SIZE SANDWICHES, INC.,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION OF NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED FOR REVIEW

In light of Section 8(d) of the Labor Management Relations Act and this Court's holdings that the National Labor Relations Board cannot regulate the substantive terms of a collective bargaining agreement or impose its views on what terms a party must accept, did the Eleventh Circuit improperly enforce a Board bargaining order by holding that such order and the Board's finding of bad faith "surface" bargaining can be based exclusively on the substantive content of the Petitioner-Employer's bargaining proposals and on the Petitioner's failure to agree to certain Union proposals?

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ARGUMENT

The National Labor Relations Board (Board), in its brief in opposition, avoids the question presented in the petition for writ of certiorari and by the opinion of the Court of Appeals below. The Board's statement of the question presented changes the substance of the question presented in the petition for writ of certiorari. (Such a practice, if done in a brief on the merits, would violate Rule 34.1(a) of the rules of this Court). The Board's statement suggests that there is no issue other than whether there was substantial evidence to support the decision of the Administrative Law Judge (ALJ).

The Board's brief ignores the fact that the Petitioner seeks this Court's review of a judgment of the United States Court of Appeals, Eleventh Circuit, not of the decision of the ALJ and the Board. The criteria for deciding whether a writ of certiorari should issue are whether the decision of the Court of Appeals, not of the Board, conflicts with applicable decisions of this Court on a federal question or creates conflict with the decision of another federal court of appeals on the same matter. Rules of the Supreme Court 17.1(a) and (c).

The essence of the Board's claims are that there was evidence other than the substance and content of the Petitioner-employer's bargaining proposals which caused the ALJ, Board and Court of Appeals to hold that the Petitioner had bargained in bad faith. The Board argues that if evidence in addition to the substance and content of bargaining proposals was a factor in *its* ruling, the decision of the Court of Appeals is not in conflict with decisions of this Court and with decisions of other federal courts of appeals.

The Board, at page 6 of its brief, indicates agreement with the Petitioner that the holding of the Court of Appeals below was exclusively founded on the bargaining proposals of the Petitioner and the Petitioner's insistence on them. Defining the exact nature and limits of the issue considered and decided by the Court of Appeals below requires only the reading of its

statement of the issue:

> The question to be decided is a narrow one. Whether the content of the Company's bargaining proposals together with the positions taken by the Company are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement. We defer to the Board to make the initial determination, but *we are required to review the proposals* to determine whether the Board's findings are supported by substantial evidence on the record as a whole. Pet. A-10. (emphasis supplied)

The remainder of the opinion (Pet. A-11-18) shows that the court's exclusive rationale was that the Petitioner's bargaining proposals and its insistence on them were the basis, in and of themselves, for the Court's approval of the Board's inference of "bad faith from the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable" and which "would have left the Union and employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union's certification." Pet. A-16.

The Board argues, however, that *its* decision was based not only on bargaining proposals and positions taken on them but also on other evidence which indicated the "attitude" of the Petitioner toward collective bargaining. Opposition brief, page 9. This argument is not only irrelevent, because the review here sought is of the Court of Appeals' decision, but is also somewhat misleading. It is misleading because the ALJ, in his decision, did not rely on any evidence other than the Petitioner's bargaining proposals, its insistence on them and its refusal to accept some union proposals. The ALJ did *not* conclude with the language referred to in quotes at the bottom of page 9 of the opposition brief. The ALJ did mention

"statements indicative of Respondent's attitude toward collective bargaining." Pet. A-49. He did so, however, in stating the question before him, not in advancing his conclusion. His analysis of and conclusion on this question is limited exclusively and entirely to the nature and substance of the Petitioner's bargaining proposals, primarily its proposal on employee wages. Pet. A-47, A-49-56. *No mention is made of utterances or other conduct of the Petitioner other than statements related directly to what would or would not be written in a collective bargaining agreement.* The only "other evidence" to which the Board could be directing this Court's attention is in the first paragraph of Pet. A-56, in which the ALJ recounted discussions during bargaining of assertedly ungenerous or unfavorable conditions of employment which the Petitioner proposed at one time or another. These discussions, to the extent they were relied on by the ALJ, which is unclear, were *part* of the proposals considered unworkable or unreasonable, and are *not* conduct unrelated to the substance of bargaining proposals, and thus do not make the question presented broader than as stated in the petition. In this regard, it is important to note that the Court of Appeals began its analysis with the premise that there was no evidence that the Petitioner "engaged in any conduct away from the bargaining table that might tend to show it would not conclude an agreement with the Union." Pet. A-9.

Finally, it should be noted that the Board, while reaching into the ALJ's decision to try to broaden the question presented, did not question an assertion of the Petitioner which is central to this proceeding: that if the ruling of the court below is not set aside, the Petitioner will either have to make proposals more acceptable to the union and to the Board, or face charges of contempt. Just as this Court, in *H. K. Porter Company* v. *NLRB*, 397 U.S. 99, 104 - 105 (1970), (as recognized by the Board, Opposition brief, page 8), held that the Board lacks power to order a party to agree to a particular contract article, the Board similarly lacks authority to order a party to grant any terms or conditions to another party. *Ibid.* This Court, in *Porter* and in

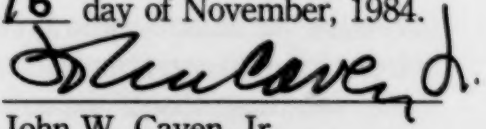
NLRB v. *American Insurance Company*, 343 U.S. 395 (1952), anticipated the claims made in the Board's opposition brief by stating that the Board "may not, either directly *or indirectly*, compel concessions or *otherwise sit in judgment* upon the substantive terms of collective bargaining agreements." (emphasis supplied). *Porter*, 397 U.S. 106; *American*, 343 U.S. 404. The Court of Appeals' ruling that the Petitioner violated §8(a)(5) of the Act by making and adhering to "unworkable" proposals, if not set aside, will force the Petitioner to grant the Union more favorable terms. The Court of Appeals' decision thus creates a direct, exact and clear-cut conflict with *Porter* and *American*, as well as with the federal appellate decisions cited at Pet. A-8-11.

CONCLUSION

For the reasons above set forth, it is respectfully and earnestly submitted that the question presented is exactly as presented in the petition for writ of certiorari.

It is respectfully urged that a writ of certiorari be directed to the United States Court of Appeals for the Eleventh Circuit so that the conflicts may be resolved.

Respectfully submitted, this
16 day of November, 1984.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the within and foregoing has been furnished by U.S. Mail from Jacksonville, Florida this 16 day of November, 1984 to all parties required to be served by and otherwise as required by Rule 28.4(a) and .5, Rules of the Supreme Court. The following parties were thus served.

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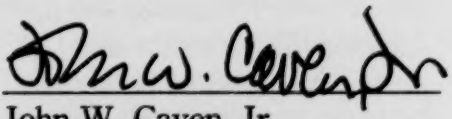

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